No. 78-5471

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS W. WHALEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys
Department of Justice
Washington, D.C. 20530

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	1
Constitutional and statutory provisions involved	1
Statement	8
Summary of argument	14
Argument:	
I. The Double Jeopardy Clause does not bar the imposition, in a single sentencing proceeding following a single trial, of any combination of punishments authorized by the legislature for the offenses of which the defendant stands convicted	14
A. Introduction	14
B. Rape and first degree (felony) murder are not the "same" offense for double jeopardy purposes	18
C. The Double Jeopardy Clause forbids imposition only of a "multiple" punishment that the legislature has not authorized	30
1. The protection against successive trials and the protection against multiple punishments are distinct	30

Argument—Continued

	Page
2. The Double Jeopardy Clause does not limit the power of the legislature to fix punishment....	37
3. The "Blockburger Test" is not the exclusive standard for determining whether a defendant may be consecutively sentenced	42
II. The determination by the highest court of the District of Columbia that the applicable local statutes authorize consecutive punishments for rape and for a murder committed in the course of that rape is correct and should not be overturned	53
A. This Court should not review the construction given by the highest court of the District of Columbia to a statute of purely local application	55
B. Petitioner's failure to raise the statutory construction issue in his petition also justifies a refusal to review it	58
C. Congress intended to allow consecutive sentences for felony murder and rape	60
1. Felony murder and the underlying felony were discrete offenses at common law	62

Argument—Continued

	Page
2. The history of the District's first degree murder statute shows that felony murder and rape are separately punishable offenses	67
3. The murder and rape statutes protect different societal interests	74
4. The effect of D.C. Code Ann. § 23-112 authorizes consecutive sentences for petitioner's case..	79
Conclusion	86

CITATIONS

Cases:

Abbate v. *United States*, 359 U.S. 187	43, 74
Albrecht v. *United States*, 273 U.S. 1	22, 23, 39
Allen v. *State*, 199 Kan. 147, 427 P.2d 598	65
Ashe v. *Swenson*, 397 U.S. 436	3, 31, 43, 62, 74
Bell v. *United States*, 349 U.S. 81	31, 39, 61
Benton v. *Maryland*, 395 U.S. 784	31, 32
Blango v. *United States*, 373 A.2d 885	66-67
Blockburger v. *United States*, 284 U.S. 299	9, 20, 26
Borum v. *United States*, 409 F.2d 433, cert. denied, 395 U.S. 916	36, 80
Bouie v. *City of Columbia*, 378 U.S. 347	38
Bozza v. *United States*, 330 U.S. 160	36
Brown v. *Ohio*, 432 U.S. 161	*passim*
Calder v. *Bull*, 3 U.S. (3 Dall.) 386	38
Callanan v. *United States*, 364 U.S. 587	61
Candler v. *State*, 363 N.E. 2d 1233	67

Cases—Continued — Page

Carter v. *McClaughry*, 183 U.S. 365 43
Cassius v. *Arizona*, 110 Ariz. 485, 520 P.2d 1104, cert. dismissed as improvidently granted, 420 U.S. 514 49
Coker v. *Georgia*, 433 U.S. 584 ..... 38, 77
Commonwealth v. *Bastone*, 466 Pa. 548.... 65
Commonwealth v. *Watkins*, 379 N.E. 2d 1040 64
Davenport v. *United States*, 353 F.2d 882.. 82
Dorszynski v. *United States*, 415 U.S. 424.. 31, 37
Ebeling v. *Morgan*, 237 U.S. 625 39
Ellis v. *United States*, 395 A.2d 404 76
Ennis v. *State*, 364 S.2d 497 26
Fisher v. *United States*, 328 U.S. 463..... 57, 58
Fowler v. *United States*, 374 A.2d 856.... 84
Fuller v. *United States*, 407 F.2d 1199, cert. denied, 393 U.S. 1120 .....63-64, 66
Garrett v. *State*, 573 S.W. 2d 543 67
Gavieres v. *United States*, 220 U.S. 338.. 22
General Talking Pictures Co. v. *Western Electric Co.*, 304 U.S. 175 59
Gore v. *United States*, 357 U.S. 386.....17, 20, 37, 41, 60-61
Green v. *United States*, 355 U.S. 184....31, 32, 66
Griffin v. *United States*, 336 U.S. 704..... 57
Hall v. *United States*, 343 A.2d 35 75
Hammond v. *United States*, 345 A.2d 140.. 84
Harris v. *Oklahoma*, 433 U.S. 682 28
Harris v. *State*, 555 P.2d 76 28
Harris v. *United States*, 359 U.S. 19 23
Iannelli v. *United States*, 420 U.S. 770.... 21, 22-23, 48, 60
Ingram v. *United States*, 353 F.2d 872.... 81

Cases—Continued — Page

Ingraham v. *Wright*, 430 U.S. 651 38
Irby v. *United States*, 390 F.2d 432 75
Jeffers v. *United States*, 432 U.S. 137..... 11, 24, 26, 27, 32, 44, 51
Ladner v. *United States*, 358 U.S. 169 39
Lange, Ex Parte, 85 U.S. (18 Wall.) 163 ..... 34, 35
Lockett v. *Ohio*, 438 U.S. 586 38
Loving v. *Virginia*, 388 U.S. 1 38
McFadden v. *United States*, 395 A.2d 14.. 75-76
Morgan v. *Devine*, 237 U.S. 632 ..... 43, 52
Neilsen, In re, 131 U.S. 176 ..... 29, 30
North Carolina v. *Pearce*, 395 U.S. 711.... 35
People v. *Lytton*, 257 N.Y. 310 65
People v. *Moran*, 246 N.Y. 100 67
People v. *Nichols*, 230 N.Y. 221 ..... 65, 67
Pernell v. *Southall Realty*, 416 U.S. 363.. 12-13, 57, 58
Price v. *Georgia*, 398 U.S. 323 ..... 31, 32
Prince v. *United States*, 352 U.S. 322..... 31
Pynes v. *United States*, 385 A.2d 772, pet. for cert. pending, No. 78-5471 76
Robinson v. *California*, 370 U.S. 660 38
Roe v. *Wade*, 410 U.S. 113 38
Rogers v. *State*, 83 Nev. 376 65
Rouse v. *United States*, 402 A.2d 1218..... 75
Sanabria v. *United States*, 437 U.S. 54..22, 24, 38
Scarborough v. *United States*, 431 U.S. 563 61
Shanahan v. *United States*, 354 A.2d 524.. 64
Simpson v. *United States*, 435 U.S. 6....11, 44, 60
Smith v. *Daily Mail Publishing Co.*, No. 78-482 (June 26, 1979) 38
Smith v. *United States*, 418 F.2d 1120..... 82

Cases—Continued

	Page
Stanley v. *Georgia*, 394 U.S. 557	38
State v. *Barton*, 5 Wash. 2d 234, 104 P.2d 63	65
State v. *Cooper*, 13 N.J.L. 361	29
State v. *Foy*, 224 Kan. 558	67
State v. *Pittman*, 118 Ariz. 71, 574 P.2d 1290	65
State v. *Reyes*, 209 Or. 595, 308 P.2d 182	65
State v. *Stancliff*, 467 S.W. 2d 26	65
Thompson v. *Oklahoma*, 429 U.S. 1053	30, 43
Trop v. *Dulles*, 356 U.S. 86	34
United States v. *Ball*, 163 U.S. 662	31
United States v. *Batchelder*, No. 78-776 (June 4, 1976)	61
United States v. *Branic*, 495 F.2d 1066	62, 63
United States v. *Butler*, 462 F.2d 1195	73, 75
United States v. *Culbert*, 435 U.S. 371	61
United States v. *DiFrancesco*, No. 78-1250 (2d Cir. Aug. 6, 1979)	37
United States v. *Dioguardi*, 492 F.2d 70, cert. denied, 419 U.S. 873	39
United States ex rel. Ferrari v. *Henderson*, 474 F.2d 510, cert. denied, 414 U.S. 843	36-37
United States v. *Gaddis*, 424 U.S. 544	51
United States v. *Greene*, 489 F.2d 1145, cert. denied, 419 U.S. 977	63, 75
United States v. *Jackson*, 390 U.S. 570	68
United States Ex Parte, 242 U.S. 27	38
United States ex rel. Jackson v. *Follette*, 462 F.2d 1041, cert. denied, 409 U.S. 1045	63
United States v. *Jorn*, 400 U.S. 470	32
United States v. *Lee*, 489 F.2d 1242	5
United States v. *Long*, 524 F.2d 660	39

Cases—Continued

	Page
United States v. *Stokes*, 365 A.2d 615	5
United States v. *Stolarz*, 550 F.2d 488	75
United States v. *Tateo*, 377 U.S. 463	31
United States v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218	38
United States v. *Whitaker*, 447 F.2d 314	75
United States v. *Wiltberger*, 18 U.S. (5 Wheat.) 76	38
Vanetzian v. *Hall*, 562 F.2d 88	26
Waller v. *United States*, 389 A.2d 801, pet. for appeal pending, No. 78-5928	76
Wheeler v. *United States*, 165 F.2d 225, cert. denied, 333 U.S. 830	67

Constitution, statutes and rules:

	Page
United States Constitution:	
Article III	57
First Amendment	38
Fifth Amendment, Double Jeopardy Clause	*passim*
Eighth Amendment	38
Fourteenth Amendment, Due Process Clause	35
Ex Post Facto Clause	38
Act of March 3, 1901, ch. 854, 31 Stat. 1189 *et seq.*:	67-68
Section 1, 31 Stat. 1189	68
Section 798, 31 Stat. 1321	68
Section 800, 31 Stat. 1321	68
Section 801, 31 Stat. 1321	68
Section 802, 31 Stat. 1321	68
Section 808, 31 Stat. 1322	68
Section 934, 31 Stat. 1341	69

Constitution, statutes and rules—Continued	Page
Act of June 12, 1940, ch. 339, Section 1, 54 Stat. 347	69
Act of March 22, 1962, Pub. L. No. 87-423, Section 1, 76 Stat. 46	70
Act of July 29, 1970, Pub. L. No. 91-358, Section 204, 84 Stat. 600	68
District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 *et seq.*	57
Section 210, 84 Stat. 604	79
Section 210, 84 Stat. 610	79
10 U.S.C. 818	34
10 U.S.C. 857	34
10 U.S.C. 858	34
10 U.S.C. 858a	34
18 U.S.C. 371	23
18 U.S.C. 924(c)	11, 12, 15, 48
18 U.S.C. 1955	23
18 U.S.C. 1962	11-12, 48
18 U.S.C. 1962(c)	15
21 U.S.C. 841(b)	34
21 U.S.C. 846	27, 28
21 U.S.C. 848	27, 28, 34, 49
21 U.S.C. 848(b)(1)	27
21 U.S.C. 848(b)(2)	27
28 U.S.C. 1257	57
28 U.S.C. 2106	87
D.C. Code Ann. (1973 ed.):	
§ 22-501	24
§ 22-504	41
§ 22-1801(a)	6
§ 22-2201	5, 6, 79
§ 22-2401	*passim*

Constitution, statutes and rules—Continued	Page
§ 22-2403	5, 19, 69, 72
§ 22-2404	3, 5, 18, 70, 71
§ 22-2801	3, 6, 18, 25
§ 23-112	3, 13, 79, 80, 81, 82, 83, 84, 85, 86
§ 24-203	4
§ 24-203(a)	68, 72, 79
Sup. Ct. R. 23(1)(c)	59
Fed. R. Crim. P. 31(c)	77
Miscellaneous:	
Arent and MacDonald, *The Felony Murder Doctrine And Its Application Under the New York Statutes*, 20 Cornell L.Q. 288 (1935)	64, 65, 66
W. Blackstone, *Commentaries*	63
7 Brooklyn L. Rev. 79 (1937)	30
107 Cong. Rec. 12154 (1961)	72
108 Cong. Rec. (1962):	
pp. 4128-4129	71, 75
p. 4131	13
p. 4145	74
H.R. Rep. No. 677, 87th Cong., 1st Sess. (1961)	72
H.R. Rep. No. 91-907, 91st Cong., 2d Sess. (1970)	57, 68, 80, 81, 82
Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513 (1949)	75
Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317 (1954)	29-30
Manual for Courts-Martial (1951 & Cum. Supp. 1959)	34

Miscellaneous—Continued Page

Note, *Statutory Multiple Punishment and Multiple Prosecution Protection*, 50 Minn. L. Rev. 1102 (1966) 29
Note, *Twice in Jeopardy*, 75 Yale L.J. 262 (1965) 22, 40, 62, 69, 75
Perkins, *A Re-examination of Malice Aforethought*, 43 Yale L.J. 557 (1934).. 64, 66
2 F. Polock and F. Maitland, *History of English Law* (2d ed. 1905) 69
S. Rep. No. 373, 87th Cong., 1st Sess. (1961) 72
S. Rep. No. 1175, 75th Cong., 1st Sess. (1937) 70
R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978) 59
Wechsler and Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701 (1937) 64, 66, 76, 77

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5471

THOMAS W. WHALEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 8-27; Pet. App. 1a-15a) is reported at 379 A.2d 1152.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1977. A petition for rehearing was denied on July 14, 1978 (A. 27; Pet. App. 16a). The petition for a writ of certiorari was filed on

September 25, 1978, and was granted on April 16, 1979.[1] The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether the imposition of consecutive sentences for felony murder and for the underlying felony, in a single sentencing proceeding following a single trial, violates the Double Jeopardy Clause of the Fifth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.

2. D.C. Code Ann. § 22-2401 (1973 ed.) provides in pertinent part:

> Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, * * * rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed

[1] The petition for certiorari was filed on behalf of both petitioner and James E. Pynes. The order granting certiorari was limited to petitioner's case.

> with or using a dangerous weapon, is guilty of murder in the first degree.

3. D.C. Code Ann. § 22-2404 (1973 ed.) provides in pertinent part:

> The punishment of murder in the first degree shall be death by electrocution unless the jury by unanimous vote recommends life imprisonment; or if the jury, having determined by unanimous vote the guilt of the defendant as charged, is unable to agree as to punishment it shall inform the court and the court shall thereupon have jurisdiction to impose and shall impose either a sentence of death by electrocution or life imprisonment.
>
> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

4. D.C. Code Ann. § 22-2801 (1973 ed.) provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will * * * shall be imprisoned for any term of years or for life.

5. D.C. Code Ann. § 23-112 (1973 ed.) provides:

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another

transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

6. D.C. Code Ann. § 24-203 (1973 ed.) provides in pertinent part:

> (a) Except as provided in subsections (b) and (c), in imposing sentence on a person convicted in the District of Columbia of a felony, the justice or judge of the court imposing such sentence shall sentence the person for a maximum period not exceeding the maximum fixed by law, and for a minimum period not exceeding one-third of the maximum sentence imposed, and any person so convicted and sentenced may be released on parole as herein provided at any time after having served the minimum sentence. Where the maximum sentence imposed is life imprisonment, a minimum sentence shall be imposed which shall not exceed fifteen years' imprisonment * * *.

STATEMENT

In the District of Columbia, first degree murder is an offense that may be established in one of four ways. First, the prosecution may prove that the defendant purposely killed the victim with deliberate and premeditated malice. Second, it may prove that the defendant purposely killed by means of poison. Third, it may prove that the defendant purposely killed the victim in the course of committing (or attempting to commit) any felony. Fourth, the prosecution may prove that the defendant killed in the

course of committing (or attempting to commit) one of six specified major felonies, including rape. If the prosecution chooses the fourth means of proof, it need not prove that the homicide was purposeful. D.C. Code Ann. § 22-2401. First degree murder proven in either the third or fourth way is commonly known as "felony murder." Regardless of the method of proof, a conviction for first degree murder in the District of Columbia is punishable by imprisonment for a term of 20 years to life. D.C. Code Ann. § 22-2404.[2]

On September 10, 1972, between 10:30 a.m. and 12:30 p.m., Rebecca Rieser was raped and strangled in her room in the McLean Gardens apartment complex in Washington, D.C. (I Tr. 36, 52-58, 62-65; II Tr. 229). Petitioner, a maintenance worker at McLean Gardens, was indicted by a grand jury on seven counts of murder, rape, burglary, and robbery arising out of those events. He was tried by a jury in the Superior Court of the District of Columbia and was convicted on two counts of first degree murder (based on the felony murder provision of D.C. Code § 22-2401, with rape and burglary as the felonies); second degree murder, in violation of D.C. Code Ann. § 22-2403; rape, in violation of D.C. Code

---

[2] The statute also provides for a sentence of death upon conviction for first degree murder, but that provision has been held unconstitutional. See *United States* v. *Stokes*, 365 A.2d 615, 616, n.4 (D.C. App. 1976); *United States* v. *Lee*, 489 F.2d 1242, 1247 (D.C. Cir. 1973).

Ann. § 22-2801; and burglary, in violation of D.C. Code Ann. § 22-1801(a).[3]

The trial court sentenced petitioner to concurrent terms of 20 years to life imprisonment on each first degree murder count and 15 years to life imprisonment on the second degree murder count. It also sentenced him to 15 years to life imprisonment for rape and 10 to 30 years imprisonment for burglary, the sentences to run consecutively to each other and to the sentences imposed on the murder counts (A. 5).

The District of Columbia Court of Appeals reversed the convictions for burglary and first degree murder based on the burglary on the ground that the indictment had been improperly amended (A. 9-12).[4] It affirmed the convictions and consecutive sentences for rape and first degree murder based on rape. In doing so, the court held that the offenses of rape and first degree (felony) murder do not merge so as to preclude separate convictions and consecutive sentences. The court concluded that the "societal interests which Congress sought to protect by enactment of D.C. Code 1973, § 22-2401 (felony murder) and § 22-2801 (rape) are separate and distinct. The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human

[3] At the close of the government's case, the court entered a judgment of acquittal on the counts charging robbery and first degree (felony) murder based on the robbery (IV Tr. 586-587).

[4] The court of appeals denied the government's petition for rehearing on this issue (Pet App. 16a), and we have not sought further review of that ruling in this Court.

life—it dispenses with the need for the prosecution to establish that the accused killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed" (A. 15-16). In addition, the court held, "* * * while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism. Consistent with this view it is clear that rape is not a lesser included offense of felony murder, and that merger is inappropriate even absent societal interest analysis" (A. 17).

Having affirmed the conviction for felony murder, the court of appeals vacated the concurrent sentence for second degree murder, finding it to be a lesser included offense of felony murder (A. 14). The court refused, however, to reverse petitioner's conviction for second degree murder.

Thus, petitioner is now serving consecutive sentences of 15 years to life for rape and 20 years to life for murder. He does not challenge the validity of the convictions, but only the consecutive nature of the sentences. If the court of appeals' judgment is affirmed, petitioner will be eligible for parole after serving 35 years' imprisonment. If petitioner's position is sustained and the consecutive sentences are invalidated, he will be eligible for parole at least five years sooner.[5]

[5] Whether the minimum sentence in the event of reversal would be 20 or 30 years depends upon the way in which this Court disposes of the case. See note 48, *infra*.

SUMMARY OF ARGUMENT

The District of Columbia Court of Appeals held that the D.C. Code authorizes the imposition of consecutive sentences for first degree (felony) murder and for the rape that was charged and proved as the predicate felony. The court reasoned that even if rape is considered an "element" of the felony murder, the two offenses do not merge upon conviction because the two statutes were designed to protect separate societal interests, and the two offenses were sufficiently distinct. Petitioner challenges the constitutionality of his consecutive sentences under the Double Jeopardy Clause and, for the first time in his brief on the merits in this Court, asserts that the court of appeals misunderstood the congressional intent regarding the permissibility of such sentences.

I

Petitioner contends that in this case, because the prosecution had to prove the commission of the rape in order to obtain a conviction for first degree (felony) murder, the rape constituted a "lesser included" offense of felony murder and was accordingly the "same" offense for double jeopardy purposes. He further asserts that the Double Jeopardy Clause bars multiple punishments for the "same" offense, even in a single sentencing proceeding following a single trial, and even if the sentences conform to legislative authorization. We disagree with both contentions.

A. In the first place, rape and first degree (felony) murder are not the "same" offense for purposes of considering punishment under the Double Jeopardy Clause, because it is not ordinarily necessary to commit the former offense in order to commit the latter. Under *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), consecutive sentences are permissible for a violation of two separate statutory provisions if "each provision requires proof of a fact which the other does not." That test is met here, for rape requires proof of carnal knowledge while first degree murder requires proof of homicide. The fact that the prosecution here proved the commission of rape does not make rape a necessarily included offense of murder, since proof of the commission of any felony or of premeditation is sufficient to support a first degree murder conviction.

B. But even if first degree (felony) murder and rape are regarded as greater and lesser included offenses, or are for any other reason considered the "same" offense, double jeopardy principles do not bar separate, cumulative punishments for the "same" offense so long as such punishments have been authorized by the legislature. In this respect, there is a critical difference between the Double Jeopardy Clause's protection against successive trials and its protection against multiple punishments. While successive trials for the same offense are prohibited by the Double Jeopardy Clause as a constitutional policy of finality for the defendant's benefit, the protection against multiple punishments, in the con-

text of a single sentencing following a single trial, safeguards the defendant only from being punished more than the legislature intended.

Thus, the critical inquiry in the present case is not whether petitioner has been subjected to more than one punishment (indeed, legislatures commonly provide "multiple" punishments such as imprisonment and a fine for the same offense), but whether Congress intended that defendants convicted of felony murder and the underlying felony in the District of Columbia may be sentenced to consecutive terms for each crime. The Double Jeopardy Clause imposes no substantive restrictions on the legislature's power to prescribe punishment for crimes, and it is useless for petitioner to establish, as we assume he has done, that under the Double Jeopardy Clause his conviction for rape would have precluded a subsequent trial for first degree (felony) murder based on that rape. His task, rather, is to establish that the sentencing court here exceeded its legislative authorization, and this he has failed to do.

Petitioner relies on *Blockburger*, *supra*, and *Brown* v. *Ohio*, 432 U.S. 161 (1977), for the assertion—critical to his case—that consecutive sentences may never be imposed where two offenses are the "same" under *Blockburger*, *i.e.*, where one requires proof of no fact that the other does not. This Court has never struck down cumulative sentences on such a ground; more importantly, petitioner overlooks the fact that the *Blockburger* analysis was devised only as a means of discerning legislative intent. But legislative intent on the question of multiple punishment can be discerned in other ways as well, as this Court has recognized (see, *e.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-13 (1978); *Jeffers* v. *United States*, 432 U.S. 137 (1977) (plurality opinion)), and petitioner stands *Blockburger* on its head by arguing, in effect, that legislative intent, no matter how clearly expressed, should be ignored unless it conforms to the *Blockburger* test. It is one thing to hold, as *Blockburger* did, that the presence of distinct elements in two offenses demonstrates a legislative intent to allow consecutive punishments; it is quite another to use the distinct-offense test of *Blockburger*, as petitioner does, to thwart legislative intent.

C. Even if petitioner's theory regarding the existence of constitutional restrictions upon the legislature's power to authorize cumulative punishments were correct in the context of traditional greater and necessarily included lesser offenses (such as armed robbery and robbery, or first and second degree murder), it is inappropriate to reach the same conclusion with respect to the differently structured class of offenses in which there is a compound offense and a predicate offense. In addition to felony murder and the predicate felony, other examples of such "compound" offense/"predicate" offense situations include the prohibition against the use or unlawful carrying of a firearm during the commission of any other federal felony (18 U.S.C. 924(c)) and the proscription against conducting the affairs of an enterprise through a pattern of racketeering activity (18

U.S.C. 1962). We find it inconceivable that the Double Jeopardy Clause could properly be held to bar additional punishment for the use of a firearm in the commission of another crime even though the legislature has specifically prescribed such punishment. Yet that is the result to which petitioner's reasoning necessarily leads if it is correct, since the predicate felony under Section 924(c) is as much a "lesser included offense" of the firearms violation as rape is of felony murder.

Indeed, no "lesser included offense" rule can serve well in the felony murder context, because rape (or burglary or kidnapping) is never a truly included offense of murder; they are distinct acts, one committed independently of the other. That the legislature has allowed evidence of intent to commit the felony to serve as evidence of intent to commit the murder as well should not bar the imposition of consecutive sentences. The question, at bottom, should always be one of legislative intent, and the sentencing court must look to whether the legislature has provided for multiple punishments in cases such as these.

II

The District of Columbia Court of Appeals held in this case that Congress intended to allow consecutive punishment of first degree (felony) murder and rape. This Court should follow its traditional practice of not reviewing the construction given by the highest court of the District of Columbia to acts of Congress that are purely local in their application. *Pernell* v.

Southall Realty, 416 U.S. 363, 367 (1974). Furthermore, petitioner did not raise in his petition for a writ of certiorari the question whether the court of appeals' construction of local law was correct; he makes that argument for the first time in this litigation in his brief of the merits. For these reasons, this Court should not now undertake to review the conclusion of the court of appeals that local law permits separate punishments for the two crimes of which petitioner stands convicted.

If the Court does address that question, however, we believe it is clear that Congress did intend to allow cumulative punishment. The development of the felony murder doctrine at common law demonstrates that the underlying felony has never been considered a lesser included offense of murder, and Congress intended to apply that law in the District of Columbia. A contrary holding would mean that second degree murder would be subject to a more severe punishment, when combined with an associated felony, than first degree (felony) murder.

Furthermore, as the court of appeals held, the first degree (felony) murder statute and the rape statute were designed to protect entirely distinct societal interests, thus refuting petitioner's suggestion that the felony murder provision is merely a form of aggravated punishment for the felony when the defendant causes the victim's death in the course of committing the felony. Finally, by enacting D.C. Code Ann. § 23-112 in 1970, Congress expressly provided for cumulative punishment for separate convictions in circumstances such as these unless the

sentencing court specifies that the sentences are to be concurrent. These factors, considered together, demonstrate that the District of Columbia Court of Appeals was correct in its conclusion that the sentence imposed here did not exceed that authorized by Congress.

ARGUMENT

I

THE DOUBLE JEOPARDY CLAUSE DOES NOT BAR THE IMPOSITION, IN A SINGLE SENTENCING PROCEEDING FOLLOWING A SINGLE TRIAL, OF ANY COMBINATION OF PUNISHMENTS AUTHORIZED BY THE LEGISLATURE FOR THE OFFENSES OF WHICH THE DEFENDANT STANDS CONVICTED

A. Introduction

Both in petitioner's brief and in ours, frequent reference is made to the terms "same offense" and "greater and lesser included offenses." Care must be taken with the meaning of these terms. While they have been widely used in double jeopardy cases, in cases dealing with the statutorily authorized punishment for offenses, and in cases concerning the proper mode of instructing the jury regarding related offenses, they ordinarily are applied to offenses that stand in such a relationship to one another that it is impossible to commit one of the offenses without committing the other. In such a case, the subsidiary, or "lesser," offense is *necessarily* included within the greater. The present case, however, is one of a class involving statutes bearing a somewhat different relationship to each other, viz., in which the "included" offense is one of a class of offenses, any one of which

may be proved (and at least one of which must be proved) as part of the proof of the "greater" offense.[6] Whether this difference is of legal significance to the double jeopardy analysis is, of course, one of the important areas of disagreement between us and petitioner.

In this case, after the court of appeals had reversed petitioner's convictions on certain counts, he stood convicted and consecutively sentenced for rape and for first degree (felony) murder committed in the course of the rape. It is his contention that, because on the facts of the case the jury could not have arrived at a valid guilty verdict on the charge of murder without also finding that he had perpetrated or attempted to perpetrate the rape of the deceased, such rape was a "lesser included" offense of the murder. It is his further submission that the Double Jeopardy Clause bars the imposition of cumulative punishments for offenses standing in this relationship to one another, regardless whether the legislature intended to authorize such punishment.

We dispute both steps in petitioner's argument. We submit that, whatever may have been required to be proved in the particular circumstances of this case,

---

[6] Rather than calling these "greater" and "lesser included" offenses, it is more accurate to call them "compound" and "predicate" offenses. In addition to cases like the instant one, involving felony murder and an underlying felony, the same issue is presented with statutes like 18 U.S.C. 924(c), prohibiting the use or unlawful carrying of a firearm during the commission of a federal felony, and 18 U.S.C. 1962(c), prohibiting the conduct of the affairs of an enterprise by a pattern of racketeering activity. See discussion at pages 48-49, *infra*.

rape and first degree (felony) murder are not the "same" offense for purposes of double jeopardy multiple punishment analysis, since it is not ordinarily necessary to commit the former offense in order to commit the latter. If that is so, petitioner's constitutional contentions fall of their own weight. But even if we are wrong in this submission, we contend that the Double Jeopardy Clause places no restrictions on the amount or number of punishments that may be imposed in a single sentencing following a single trial, save only that the punishments may not exceed those authorized under the circumstances by the legislature.

Here, the court of appeals determined that Congress intended to authorize the sentencing court to cumulate the statutory punishments specified for rape and for first degree (felony) murder for a defendant who has been convicted of killing in the course of a rape (the reviewability and correctness of that conclusion are addressed in Part II, *infra*). In effect, the court construed the punishment provisions of the pertinent sections of the District of Columbia Code as though they read as follows:

> For the commission of a premeditated homicide, the defendant shall be sentenced to a term of from 20 years' to life imprisonment. For the commission of any homicide, whether or not premeditated, in the course of a rape, the defendant shall be sentenced to a minimum term of from 20 to 35 years' imprisonment and a maximum term of life imprisonment.

We do not believe it can be seriously contended that a penalty provision drafted in the above language by Congress would raise a double jeopardy issue. See *Gore* v. *United States*, 357 U.S. 386, 391-392 (1958). The existing statutory scheme has been construed as being intended to reach the identical result. To hold the existing statutory scheme unconstitutional would thus be to trivialize the Double Jeopardy Clause and the very important policies that it serves. It would elevate form over substance and permit Congress to achieve a concededly legitimate result only if it does so by jumping through certain prescribed hoops.

That the Double Jeopardy Clause deals with substance and not form, and does not require Congress to go through any particular motions in fixing the appropriate penalty for criminal conduct, was underlined by this Court in *Gore* v. *United States*, *supra*. The Court was there faced with a statutory scheme that treated a single narcotics transaction as three separate offenses, each carrying a five year penalty. The defendant had been convicted of violating all three statutes at a single trial and had been given consecutive sentences. He claimed that these sentences violated the Double Jeopardy Clause. The Court rejected the claim. It pointed out that Congress could have passed a single statute making it a crime, punishable by 15 years' imprisonment, to commit acts that would have violated all three of the existing statutes. This being the case, the Court concluded that the only issue was whether the Congress had intended that the five year sentences be cumulative. Concluding that it had, the Court rejected the double jeopardy claim.

B. Rape And First Degree (Felony) Murder Are Not The "Same" Offense For Double Jeopardy Purposes

The evidence showed that petitioner, in what must have been one brief and violent episode, raped and murdered Rebecca Rieser. In the District of Columbia, rape is punishable by imprisonment for any term of years or for life, D.C. Code Ann. § 22-2801, and petitioner was convicted and sentenced to a term of 15 years to life imprisonment for that crime. As noted above (see pages 4-5, *supra*), murder in the first degree includes a purposeful killing in the course of any felony or any killing of another person while perpetrating or attempting to perpetrate one of six specified major felonies, including rape. D.C. Code Ann. § 22-2401. Petitioner was convicted of first degree (felony) murder as well as rape, and his sentence of 20 years to life imprisonment (see D.C. Code Ann. § 22-2404) was made to run consecutively to the rape sentence.

Had petitioner been convicted of first degree murder through proof that he killed with "deliberate and premeditated malice," rather than through proof that he killed while committing another felony, he would not have even a colorable claim that his consecutive sentences for the two offenses violate the Double Jeopardy Clause. Murder and rape are utterly distinct offenses by any measure, and it could hardly be suggested that, if the government's evidence proved that a defendant had raped his victim, and also murdered her "purposely * * * of deliberate and premeditated malice," the defendant could not, consistent with the Double Jeopardy Clause, be sentenced

consecutively for each crime.[7] Petitioner recognizes this truth. Br. 30 n.15.

Petitioner's claim in this case depends on the fact that, at his trial, the government proved the first degree component of the murder—as it incontestably was entitled to do—by proving that the homicide was committed in the course of rape. Under this "felony murder" theory, the government was not required to prove that the killing was done "purposely * * * of deliberate and premeditated malice." D.C. Code Ann. § 22-2401.[8] As the court of appeals stated, "[t]he felony murder statute * * * dispenses with the need for the prosecution to establish that the accused killed with a particular state of mind, and instead permits the jury to infer the requisite intent from the fact that a felony was committed" (A. 15-16).[9] The essence of petitioner's claim is that, in these circumstances, rape

---

[7] Petitioner was not charged with first degree murder in this fashion; he was charged with three counts of first degree murder, based on the predicate felonies of rape, burglary and robbery (on the last count the court entered a judgment of acquittal at the close of the government's case, see note 3, *supra*) and one count of second degree murder (A. 1-2).

[8] In order to convict petitioner of second degree murder, on the other hand, the government did have to prove that petitioner killed with a particular state of mind, *i.e.*, malice aforethought. D.C. Code Ann. § 22-2403. Petitioner concedes (Br. 30 n.15) that he may be sentenced consecutively for rape and second degree murder.

[9] As we show below (see pages 63-64, *infra*), this theory of transferred intent embodied in Section 2401 has its origins in the common law notion of "implied malice" that developed as part of the felony murder doctrine.

is a lesser included offense of first degree (felony) murder, and thus the two offenses "are, for double jeopardy purposes, 'the same' offense for which only one punishment can be imposed * * *; therefore cumulative punishment for felony-murder (rape) and the underlying rape constitutes impermissible double punishment for the same rape offense" (Br. 8).

Petitioner contends only that the Double Jeopardy Clause prohibits multiple punishments for the "same" offense. Thus, the threshold question is whether rape and first degree (felony) murder, as defined in the District of Columbia Code, are the "same" or "different" offenses for double jeopardy purposes. For present purposes, we assume that the court below correctly concluded that Congress meant to punish these two offenses separately; indeed, petitioner did not contend otherwise in the court of appeals, nor did he challenge this conclusion in his petition for certiorari (see pages 58-60, *infra*). If the two offenses are not the "same," it is clear that, as a constitutional matter, they may be punished consecutively, since the Double Jeopardy Clause does not even arguably forbid two punishments for different offenses. *Gore* v. *United States*, *supra*, 357 U.S. at 392-393.

The test announced in *Blockburger* v. *United States*, 284 U.S. 299 (1932), provides a relatively simple, albeit mechanistic, means of determining whether two offenses are the "same." In *Blockburger*, the defendant made two separate sales of narcotics. He was tried, convicted, and consecutively sentenced on two counts relating to each sale: first, that he had

sold drugs not in the original package (an offense under one statute), and second, that he had sold drugs not pursuant to written order of the purchaser (an offense under another statute). In this Court, he contended that he could be punished only once for each sale, simply because there had been only one sale on each occasion. The Court disagreed (*id.* at 304):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

The Court determined that the original-package offense and the written-order offense met this test, for each required proof of an element that the other did not. *Ibid.*

Thus, the *Blockburger* test was devised as a method of determining whether Congress had created one crime or two, and thus whether a defendant could be sentenced to one jail term or two. "The test articulated in *Blockburger* serves the function of identifying congressional intent to impose separate sanctions for multiple offenses arising in the course of a single act or transaction." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975). The Court decided that, in the absence of other evidence, the congressional intent could be determined by inquiring whether each crime required proof of an element that the other did not. If so, the offenses were not the same; otherwise, they were.

Although the decision in *Blockburger* addressed a problem of statutory construction and not of consti-

tutional doctrine (Blockburger raised no double jeopardy claim, and the Court did not decide any), the test itself was clearly derived from this Court's earlier double jeopardy decisions. See 284 U.S. at 304 (citing *Gavieres* v. *United States*, 220 U.S. 338, 342 (1911), and *Albrecht* v. *United States*, 273 U.S. 1, 11-12 (1927)). The *Blockburger* test and its antecedents have been employed "to determine whether a single transaction may give rise to separate prosecutions, convictions, and/or punishments under separate statutes." *Sanabria* v. *United States*, 437 U.S. 54, 70 n.24 (1978). As we explain below, however (see pages 43-44, *infra*), this Court has never held that the *Blockburger* test is the only standard for determining whether multiple sentences are constitutionally permissible. In any event, we now demonstrate that, under the *Blockburger* test, the District of Columbia rape and first degree (felony) murder statutes at issue here create different offenses that may be punished separately without offending the Double Jeopardy Clause.

The *Blockburger* or "distinct elements" test (see Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 273 (1965)) emphasizes the elements of the two crimes as they are set forth in the statutes; indeed, the word "provision" was specifically used by the Court in setting forth the test (see page 20, *supra*). "If each [offense] requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes * * *." *Brown* v. *Ohio*, 432 U.S. 161, 166 (1977), quoting from *Iannelli* v. *United States*,

supra, 420 U.S. at 785 n.17. This Court has consistently applied the test in this manner.

For example, in *Albrecht* v. *United States*, *supra*, the defendant was sentenced consecutively for illegal possession and sale of liquor. He contended that, since the same liquor was involved in the possession and the sale count, he was being doubly punished in violation of the Double Jeopardy Clause. But because it is *theoretically* possible for one to possess without selling on the one hand, and to cause delivery of contraband which he has never possessed, on the other hand, the Court concluded that the two offenses are distinct, notwithstanding the fact that the evidence adduced at trial showed that the defendant had in fact sold the same liquor that he had possessed. Similarly, in *Harris* v. *United States*, 359 U.S. 19 (1959), the defendant claimed that he could not be cumulatively sentenced for buying narcotics except in or from the original stamped package and for receiving and concealing unlawfully imported narcotics, since in order to convict him of both offenses, the prosecution had to prove only one act of possessing the same narcotics, while the remaining elements of each offense were supplied by statutory presumptions. But because "the *violation*, as distinguished from the direct evidence offered to prove that violation, was distinctly different under each of the respective statutes," the Court held that the consecutive sentences were permissible. 359 U.S. at 23 (emphasis in original).[10]

---

[10] The same argument was rejected in *Iannelli* v. *United States*, *supra*, where the Court concluded that conspiracy

Petitioner argues (Br. 16-18 & n.6) that the *Blockburger* test makes sense only when applied to the specific allegations in the indictment, rather than to the statutory elements of the offenses.[11] This argument ignores the language of the test and the manner in which this Court has consistently applied it. It makes little sense, moreover, to say that two statutory offenses that were intended by the legislature to be punished consecutively may only be so punished if the indictment is drawn by the prosecutor in a certain way. While petitioner's approach may be helpful in the successive prosecution context, see *Sanabria* v. *United States*, *supra*, 437 U.S. at 65-66, it is unsuitable for purposes of determining the propriety of consecutive sentences because it elevates the form of a particular indictment—which may contain superfluous allegations—over the substance

(18 U.S.C. 371) and conducting an illegal gambling business involving five or more persons (18 U.S.C. 1955) were not the "same" offense under the *Blockburger* test despite the fact that the gambling offense in that case was operated conspiratorially. Although as a practical matter the group involved in the gambling business will almost always act in concert, it is at least possible that the five persons "involved" in the operation might not be in criminal concert. See 420 U.S. at 785 n.17; see also *Jeffers* v. *United States*, 432 U.S. 137, 148 n.13 (1977) (plurality opinion).

[11] Petitioner also argues (Br. 17-18) that under our analysis, assault with intent to kill as defined in the District of Columbia Code (D.C. Code Ann. § 22-501) is not a lesser included offense of first degree murder because it is possible to commit the latter offense without committing the former by poisoning the victim. Petitioner overlooks the fact that administration of poison is proscribed along with other forms of assault in section 501.

of the crimes as defined by the legislature. As we show below (see pages 30-37, *infra*), these two aspects of double jeopardy implicate different interests.

Applying the *Blockburger* test to the offenses for which petitioner was convicted and consecutively sentenced, it is clear that they are different and thus separately punishable under the Double Jeopardy Clause. The District of Columbia rape statute (D.C. Code Ann. § 22-2801) requires proof of carnal knowledge, while the applicable felony murder provision of the first degree murder statute (D.C. Code Ann. § 22-2401) does not. Likewise, in order to convict for felony murder the prosecution must show that the defendant killed his victim, whereas a killing need not be proved to convict for rape. Satisfaction of the *Blockburger* test thus demonstrates that Congress defined separate crimes that may be cumulatively punished.

Petitioner contends (Br. 13), however, that because the jury could not convict him of first degree (felony) murder unless it found that he had committed the underlying felony, here rape, the rape was a lesser included offense of first degree (felony) murder. Petitioner further contends that since greater and lesser included offenses are considered the "same" offense for double jeopardy purposes, he may not be punished separately for rape and first degree (felony) murder. Petitioner's conclusion falls with his premise, since the underlying offenses are not lesser included offenses of felony murder.[12]

[12] And his conclusion is wrong even if the premise is correct. See pages 30-53, *infra*.

A greater offense will invariably require proof of every fact necessary to show the lesser included offense as well as proof of one or more additional elements. See *Jeffers* v. *United States*, 432 U.S. 137, 150 (1977) (plurality opinion); *Brown* v. *Ohio*, *supra*, 432 U.S. at 167-168. Under D.C. Code Ann. § 22-2401, however, neither rape nor any of the other enumerated felonies is a *necessarily* included offense of felony murder, since proof of the commission of *any* of those enumerated felonies is sufficient to support a felony murder conviction. Put another way, the statute does not require that rape need always be proven in order to secure a conviction for murder committed in the course of a felony. See *Ennis* v. *State*, 364 S.2d 497, 499 (Fla. App. 1978); cf. *Vanetzian* v. *Hall*, 562 F.2d 88, 89-90 & n.2 (1st Cir. 1977).

None of this Court's decisions relied upon by petitioner supports his argument that rape and first degree (felony) murder are the "same" offense. In *Brown* v. *Ohio*, *supra*, this Court held that, once the defendant had been convicted and punished for the offense of "joyriding"—taking or operating an automobile without the owner's consent—he could not thereafter be tried for theft of the auto. The Court noted that joyriding was, under Ohio law, a lesser included offense of auto theft. 432 U.S. at 163-164, 167. Because each [offense did not] require "proof of a fact that the other does not * * *," *Brown* v. *Ohio*, *supra*, 432 U.S. at 166, quoting *Blockburger* v. *United States*, *supra*, 284 U.S. at 304, the offenses were the "same." The Court thus held that the trial court had erred in overruling Brown's objection that

the Double Jeopardy Clause barred a trial for the auto theft following his trial and conviction for joyriding. See 432 U.S. at 163-164.

Here, in contrast to *Brown*, the court of appeals, in construing the provisions of the District of Columbia Code, has concluded that rape is not a lesser included offense of first degree (felony) murder. Moreover, unlike the situation under the applicable Ohio statutes, which made it impossible to commit auto theft without also committing joyriding because one cannot steal a car unless one takes it without the owner's consent, one can certainly rape without killing or kill without raping. Even when one does both, as petitioner did, he performs two separate acts; first he rapes, then he kills.

In *Jeffers* v. *United States*, 432 U.S. 137 (1977), the plurality assumed, without deciding, that the "in concert" language of 21 U.S.C. 848 requires proof of an agreement among the persons involved in the continuing enterprise. 432 U.S. at 149-150. Based on that assumption, the plurality concluded that the offense of conspiracy defined in 21 U.S.C. 846 was a lesser included offense within Section 848, and that the two offenses were the "same" for double jeopardy purposes. 432 U.S. at 150-151; see also *id.* at 158 (opinion of Stevens, J.). If the term "in concert" refers to an agreement, then, like the situation in *Brown* and unlike that here, it is impossible to violate the continuing criminal enterprise statute without at the same time committing the offense of conspiracy.[18]

[18] Petitioner contends (Br. 21; emphasis in original) that under the approach we urge, the plurality in *Jeffers* would

While *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), is somewhat more pertinent, it too does not confirm petitioner's view of the *Blockburger* test. Harris was convicted of felony murder arising out of an armed robbery. He was then charged, in a second prosecution, with the armed robbery. Prior to trial he moved to dismiss the information, asserting that under the Double Jeopardy Clause his earlier conviction barred any subsequent trial for armed robbery. *Harris* v. *State*, 555 P.2d 76, 78 (Okl. Crim. App. 1976). This motion was denied, and petitioner was tried, convicted, and sentenced to 30 years' imprisonment. *Id.* at 77. This Court reversed in a per curiam opinion. It held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." 433 U.S. at 682.

---

have concluded that Section 846 does not define a lesser offense of Section 848, "because, as with felony murder, any one of a range of predicate offenses *could have been* charged to establish the § 848 violation. These offenses *could have been* different from those the defendant was alleged to have conspired to commit under § 846." But it is clear from the structure of the statute that the "in concert" language of Section 848 refers not to the predicate offense which the defendant must be shown to have committed under subdivision (b)(1), but to the continuing series of violations which must be shown under subdivision (b)(2). Thus, regardless of which particular crime serves as a predicate offense, the government must still always establish, as a separate statutory requirement, a pattern of violations committed "in concert" with other members of the enterprise. Accordingly, while no particular substantive offense would be necessarily included within the continuing enterprise offense defined in Section 848, the conspiracy offense would be.

But the Court did not expressly hold that robbery and murder were the "same" offense under the *Blockburger* test; indeed, the brief opinion in *Harris* does not even cite the *Blockburger* decision. Instead, the Court relied primarily on *In re Nielsen*, 131 U.S. 176 (1889), which, like all of the other cases cited in *Harris*, involved multiple prosecutions.[14]

In *Nielsen* the Court held that a conviction for cohabitation with two wives over a two and one-half year period barred a later prosecution for adultery with one of the wives on the day following the end of that period. As this Court recently observed in *Brown* v. *Ohio*, *supra*, the adultery and cohabitation charges in *Nielsen* each required proof of an element which the other did not; nonetheless, the Court in *Nielsen* "held the separate offenses to be the 'same' for purposes of protecting the accused from having to 'run the gantlet' a second time." *Brown* v. *Ohio*, *supra*, 432 U.S. at 167 n.6.[15] Thus,

---

[14] What *Harris* does establish is that, had petitioner been previously convicted or acquitted of the felony murder, he could not thereafter have been tried for the rape that formed the predicate for the murder conviction.

[15] The Court in *Nielsen* (131 U.S. at 190) cited with approval the decision of the New Jersey Supreme Court in *State* v. *Cooper*, 13 N.J.L. 361 (1833), which held that a conviction for arson barred a subsequent indictment for felony murder based on the death of a man killed in the fire. *Cooper* lends no support to petitioner, however, since that successive prosecution decision has uniformly been viewed as applying the "same transaction" test. See Note, *Statutory Multiple Punishment and Multiple Prosecution Protection*, 50 Minn. L. Rev. 1102, 1106 n.24 (1966); Lugar, *Criminal Law, Double Jeopardy and Res Judicata*, 39 Iowa L. Rev. 317,

Harris v. *Oklahoma*, like *Nielsen*, may simply be illustrative of the general rule that "[e]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6.

A good deal of the difficulty in petitioner's argument is due to the fact that he has attempted to apply principles developed in the context of deciding whether successive trials are permissible to a case that involves the imposition of consecutive sentences in a single sentencing proceeding following a single trial. As we now show, even if first degree (felony) murder and rape are regarded as greater and lesser included offenses, or are for any other reason considered the "same" offense, double jeopardy principles do not bar separate, cumulative punishments for the "same" offense so long as such punishments have been authorized by the legislature.

C. The Double Jeopardy Clause Forbids Imposition Only of a "Multiple" Punishment That the Legislature Has Not Authorized

1. *The Protection Against Successive Trials and the Protection Against Multiple Punishments are Distinct*

There is a critical difference between the Double Jeopardy Clause's protection against multiple pun-

325 n.32 (1954); Note, 7 Brooklyn L. Rev. 79, 83 n.43 (1937). The "same transaction" test has never been accepted by this Court in the double jeopardy context. See, *e.g.*, *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977) (Brennan, J., dissenting).

ishment and its protection against successive prosecutions following conviction or acquittal. The latter protection needs no further reference to define it: once the defendant is acquitted or convicted of an offense, "the State with all its resources and power [is not] allowed to make repeated attempts to convict" him of that offense. *Green* v. *United States*, 355 U.S. 184, 187 (1957). See also *Benton* v. *Maryland*, 395 U.S. 784, 194 (1969); *Ashe* v. *Swenson*, 397 U.S. 436, 446-447 (1970).[16] The prohibition against multiple punishment, however, can be defined only by reference to the punishment that the legislature[17] has authorized for the offenses, because "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress * * *." *Bell* v. *United States*, 349 U.S. 81, 82 (1955). See *Prince* v. *United States*, 352 U.S. 322 (1957); *Dorszynski* v. *United States*, 418 U.S. 424, 431 (1974). As this Court stated in *Brown* v. *Ohio*, *supra*, 432 U.S. at 165: "Where consecutive sentences are imposed at a single criminal trial, the role of the

[16] There are, of course, exceptions to this rule. For example, there is no constitutional bar to retrial of a convicted defendant who wins reversal of his conviction on appeal, *United States* v. *Ball*, 163 U.S. 662 (1896); *Price* v. *Georgia*, 398 U.S. 323 (1970), or has it set aside on collateral attack, *United States* v. *Tateo*, 377 U.S. 463 (1964).

[17] The double jeopardy prohibition of the Fifth Amendment is applicable to the states through the Fourteenth Amendment, *Benton* v. *Maryland*, *supra*, 395 U.S. at 794, and "the same constitutional standards apply against both the State and Federal Governments." *Id.* at 795. Hence, in this brief we use the terms "legislature" and "Congress" interchangeably.

constitutional guarantee [against double jeopardy] is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."

Furthermore, the protection against successive prosecutions is designed to prevent the government from "subjecting [the defendant] to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, *supra*, 355 U.S. at 187-188; *Benton* v. *Maryland*, *supra*, 395 U.S. at 796. Stated somewhat differently, the successive-prosecution protection "serves 'a constitutional policy of finality for the defendant's benefit.'" *Brown* v. *Ohio*, *supra*, 432 U.S. at 165, quoting *United States* v. *Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion). Thus, for example, the protection against successive prosecutions protects against a retrial for murder when the first trial for murder results in a conviction only of manslaughter. *Price* v. *Georgia*, 398 U.S. 323 (1970). In this inquiry, the fact that the second trial resulted in a punishment no greater than that imposed after the first trial is irrelevant, because the protection "is cast in terms of the risk or hazard of *trial* and conviction, not of the ultimate legal consequences of the verdict." *Id.* at 331 (emphasis added); see *Jeffers* v. *United States*, *supra*, 432 U.S. at 151 n.18 (plurality opinion).

These concerns are superfluous when it comes to construing the scope of protection offered by the

guarantee against multiple punishment. A defendant who is cumulatively punished, whether legally or illegally, in a single sentencing proceeding following a single trial, suffers no continuing expense, ordeal or anxiety, nor are his chances of being convicted although innocent enhanced. His trial is "final." The protection against multiple punishments is dormant until the trial is over and sentencing begins.

Finally, successive prosecution for the same offense is, by itself, unconstitutional. No legislature could constitutionally enact a law providing that a defendant tried and convicted of an offense could thereafter be tried again and convicted of the same offense.

But the inquiry into the multiple-punishment protection is not so simple.[18] The fact is that the legislature can and frequently does authorize two punishments for the same crime. It may, in fact, provide as many different penalties for a given crime as it thinks

---

[18] It is of course true that where the Double Jeopardy Clause bars a second trial, a fortiori it bars any punishment imposed as a result of that trial. Thus, when this Court has held that a subsequent trial that in fact has taken place should not have taken place under the Clause, it holds the punishment, no less than the trial, unconstitutional. See, *e.g.*, *Brown* v. *Ohio*, *supra*, 432 U.S. at 162. In such cases, however, the Court has had no need to examine, and has not examined, the distinctions between the two protections. In some cases it has not even mentioned what the second punishment was. *E.g.*, *Harris* v. *Oklahoma*, *supra*. Because the second sentence is the consequence of an unconstitutional trial, there is no need to subject it to multiple-punishment analysis. Indeed, any such analysis would be pointless, for no matter what the outcome, the sentence would still be invalid because the trial was prohibited.

appropriate. Most offenses are punishable by both fine and imprisonment. Others have additional punishments prescribed as well. See, *e.g.*, 21 U.S.C. 848 (conviction of participating in a continuing criminal enterprise subject to punishment by imprisonment, by a fine, and by forfeiture of profits and interest in the enterprise); 21 U.S.C. 841(b) (conviction of manufacture or distribution of drugs subject to punishment by imprisonment, a fine, and a special parole term in addition to any imprisonment imposed). A general court-martial, for example, may in appropriate cases impose a punishment in four forms—confinement at hard labor, reduction in rank, forfeiture of pay, and a dishonorable discharge. 10 U.S.C. 818, 857, 858, 858a; *Manual for Courts-Martial* ¶¶ 126-127 (1951 & Cum. Supp. 1959); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

The subject of multiple punishment was first discussed in constitutional terms in *Ex Parte Lange*, 85 U.S. (18 Wall.) 163 (1873). In that case, the trial court erroneously imposed a sentence of imprisonment *and* a fine when the authorized sentence was imprisonment *or* a fine. Lange paid the fine, and the trial judge then recalled him and "corrected" the sentence to provide only for imprisonment. This Court held that once Lange had paid the fine (which, having been paid into the Treasury, could not be refunded) he had suffered punishment as the statute provided, and the trial court could not thereafter resentence him without subjecting him to impermissible double punishment:

> If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence. And * * * there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offence.

Ex Parte Lange, supra, 85 U.S. (18 Wall.) at 168, quoted in *North Carolina* v. *Pearce*, 395 U.S. 711, 717-718 (1969).

The imposition of both a fine and imprisonment in *Ex Parte Lange* was a multiple punishment prohibited by the Double Jeopardy Clause simply because Congress had not authorized both; it had authorized only one or the other. When the legislature has authorized both a fine and imprisonment as punishment, no one has ever seriously suggested that a court that imposes both violates the Double Jeopardy Clause. True, the punishment is "multiple" in the literal sense that it takes more than one form, but it is not "multiple" in the constitutional sense because the defendant is subjected only once to the punishment that the legislature has authorized; the fact that it may take two—or more—forms is irrelevant for double jeopardy purposes.[19]

---

[19] It is not entirely clear why the *Lange* Court chose to rest its decision on double jeopardy grounds, since the same result was compelled by the statute under which Lange was convicted, wholly without regard to the existence of the constitutional double jeopardy protection. Moreover, it would seem indisputable that the Due Process Clause would preclude the imposition of a sentence depriving a defendant of either liberty or property in a manner or to an extent not authorized by legislative enactment.

This principle is most strikingly illustrated by comparing *Ex Parte Lange* with *Bozza* v. *United States*, 330 U.S. 160 (1947), a case that is the converse of *Lange*. In *Bozza*, the defendant was convicted of a crime for which Congress had prescribed a mandatory punishment of imprisonment and a $100 fine. The judge sentenced Bozza to imprisonment but made no mention of a fine. Shortly afterwards, the judge recalled Bozza and sentenced him again, this time both to imprisonment and the $100 fine. Because the second sentence imposed a "valid punishment for an offense instead of an invalid punishment for that offense" (*id.* at 167), this Court rejected Bozza's contention that he had been twice punished in violation of the Double Jeopardy Clause. The Court distinguished *Lange* on the ground that Bozza, unlike Lange, "had not suffered any lawful punishment until the court had announced the full mandatory sentence of imprisonment *and* fine." *Id.* at 167 n.2 (emphasis in original). Bozza thus was punished not only in two forms—imprisonment and a fine—he was sentenced twice, first invalidly and later validly. But neither the double punishment nor the multiple sentencing violated the Double Jeopardy Clause, because he was sentenced only to what Congress had required.[20] See also *United States ex rel. Ferrari* v.

[20] A different case may well have been presented had Congress authorized imprisonment, or a fine, or both. The first sentence would then have been valid, and it is possible that the court could not have recalled Bozza to add the fine to his sentence. See *Borum* v. *United States*, 409 F.2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969). This concern does not implicate the multiple punishment protection as

Henderson, 474 F.2d 510, 513 (2d Cir.), cert. denied, 414 U.S. 843 (1973).

In short, while one may answer the question whether a defendant has been successively prosecuted in violation of the Double Jeopardy Clause by determining whether his second trial follows a previous acquittal or conviction for the same offense, one may not conclusively determine the question of multiple punishment simply by ascertaining the punishment to which he has been subjected. One must compare the defendant's sentence with the sentence that the legislature has authorized for the crime. "In every instance the problem is to ascertain what the legislature intended." *Gore* v. *United States*, 357 U.S. 386, 394 (1958) (Warren, C.J., dissenting). See *Dorszynski* v. *United States*, 418 U.S. 431 (1974).

2. *The Double Jeopardy Clause Does Not Limit the Power of the Legislature to Fix Punishment*

It is important to recognize not only that the protection against multiple punishments is to be determined by reference to what the legislature has provided, but also that the Double Jeopardy Clause places no restrictions on the power of the legislature to define crimes and to ordain their punishment.[21]

such, for the defendant could validly have been sentenced at the outset to both forms of punishment; the question it raises has to do with whether a court can vacate a valid sentence and impose a harsher one. Cf. *North Carolina* v. *Pearce*, *supra*; *United States* v. *Di Francesco*, No. 78-1250 (2d Cir. Aug. 6, 1979).

[21] Other provisions of the Constitution circumscribe this power to some extent. As to the power to define offenses, for example, the Due Process Clause of the Fourteenth Amend-

Brown v. *Ohio*, *supra*, 432 U.S. at 165; *Sanabria* v. *United States*, 437 U.S. 54, 69 (1978). Under our constitutional system, that is the legislature's duty. *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820); *Ex Parte United States*, 242 U.S. 27, 42 (1916). Thus, the legislature, by prescribing the "allowable unit of prosecution," *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952), free of any restraints imposed by the Double Jeopardy Clause, may "punish[] separately each step leading to the consummation of a transaction * * *

---

ment prohibits a legislature from making abortion during the first trimester of pregnancy a crime, *Roe* v. *Wade*, 410 U.S. 113, 164 (1973); the Due Process Clause and the Equal Protection Clause each prohibit the legislature from making miscegenation a crime, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); and the First Amendment forbids the legislature from making it a crime to possess obscene material in one's home, *Stanley* v. *Georgia*, 394 U.S. 557, 568 (1969), or for a newspaper to publish the name of a youth charged as a juvenile offender, *Smith* v. *Daily Mail Publishing Co.*, No. 78-482 (June 26, 1979), slip op. 8.

As to punishment, the Eighth Amendment precludes punishment for being a drug addict, *Robinson* v. *California*, 370 U.S. 660, 666-667 (1962), and prohibits a legislature from prescribing the death penalty for rape, at least in the absence of excessive brutality or serious injury. *Coker* v. *Georgia*, 433 U.S. 584 (1977); *id.* at 601-604 (Powell, J., concurring and dissenting). See *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and cases there discussed, and cases cited in *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). And the Ex Post Facto Clause prohibits the legislature from increasing the punishment after the crime has been committed. *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Bouie* v. *City of Columbia*, 378 U.S. 347, 353 (1964). Those decisions are of no help to petitioner here, and he does not rely on them.

and punish[] also the completed transaction." *Albrecht* v. *United States*, 273 U.S. 1, 11 (1927). The legislature can make criminal, and authorize cumulative punishment for, discrete acts that are part of a single course of action, *e.g.*, *Blockburger* v. *United States*, *supra* (consecutive prison terms permissible for two crimes committed by a single sale of narcotics); *Ebeling* v. *Morgan*, 237 U.S. 625 (1915) (five consecutive terms upheld for cutting six mail bags in one episode), or a single act that affects more than one person, *e.g.*, *Bell* v. *United States*, 349 U.S. 81 (1955) (Congress could have, but apparently did not, provide that carrying two women across state lines in one vehicle is two separately punishable crimes); *Ladner* v. *United States*, 358 U.S. 169 (1958) (Congress could have, but apparently did not, provide that firing one shot that injures two federal officers is two separately punishable crimes). See also *United States* v. *Long*, 524 F.2d 660 (9th Cir. 1975) (purchases of two pistols in a single transaction, where defendant uses the same false name, punishable by two consecutive prison terms); *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir.), cert. denied, 419 U.S. 873 (1974) (two stock purchases as part of one fraudulent scheme may be consecutively punished).

For example, a legislature could enact a statute providing that "[w]hoever is convicted of crime X shall be punished by 10 years in prison, and then shall be punished again by another five years in prison, and then shall be punished a third time by

paying a fine of $1000." Is there any difference between this provision and a provision that "[w]hoever is convicted of crime X shall be punished by 15 years in prison and a fine of $1000"? Clearly not. The former language is simply an eccentric way of stating what is more conventionally stated by the latter language.[22] Thus, a defendant who has been convicted of crime X and sentenced to a total of 15 years' imprisonment and a $1000 fine pursuant to the former provision has no double jeopardy argument, despite the fact that he literally has been punished three times for the "same offense" of committing crime X.

From this point it requires little elaboration to conclude that a legislature could provide that whoever commits crime X shall be punished by 10 years in prison and an additional five years for committing crime Y, a lesser included offense of crime X. To argue that crime Y is a lesser included offense of crime X would gain the defendant nothing when it came time for sentencing, for it would be perfectly clear that the legislature intended to punish the commission of the lesser included offense by adding five years to the sentence imposed for the greater offense. And a defendant would add nothing to his argument by demonstrating that crime Y might be the "same offense" as crime X in the sense that all its elements were also elements of crime X. The fact would remain that the legislature, in carrying out its duty to

[22] See Note, *Twice in Jeopardy*, 75 Yale L.J. 262, 302 (1965).

define crime and ordain punishment, had provided a certain punishment for those who committed both crime X and crime Y. Nothing in the Double Jeopardy Clause or elsewhere in the Constitution prohibits the legislature from carrying out its duty in this fashion.

Of course, legislatures do not normally provide criminal penalties in such circumlocutory fashion. Instead of providing a 10-year prison term followed by a five-year prison term, they normally provide simply a 15-year term. Where necessarily included lesser offenses are involved, legislatures normally express their intent by providing a certain punishment for the lesser offense and a more severe punishment for the greater. Compare, *e.g.*, D.C. Code Ann. § 22-504 (assault punishable by $500 fine, or up to 12 months' imprisonment, or both); D.C. Code Ann. § 22-501 (assault with intent to kill punishable by two to 15 years' imprisonment). But a legislature's normative practice is beside the point,[23] which is simply that, when a claim is made, as it is here, that a defendant has been sentenced to multiple punishments in violation of the Double Jeopardy Clause, such a claim cannot be decided merely by concluding that the offenses for which the defendant stands cumulatively punished might be the "same offense"

[23] This Court has found it instructive, when deciding whether multiple punishment is authorized, to determine whether the legislature could have provided the punishment imposed on the defendant by a circumlocutory definition of crimes and punishments. See *Gore* v. *United States*, *supra*, 357 U.S. at 392-393.

for purposes of invoking the Clause's protection against successive prosecutions. The legislature is free to punish the offense or offenses in a variety of ways, and if the sentence imposed does not exceed what the legislature has authorized, the defendant has received all the protection the Double Jeopardy Clause affords. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 165.

It is therefore useless for petitioner to establish that his conviction for rape would have precluded a successive prosecution for felony murder based on that rape. He must establish, rather, that the trial court, in imposing separate sentences for rape and felony murder in a single sentencing proceeding following a single trial, has exceeded its legislative authorization by imposing multiple punishments where the legislature did not authorize them. This petitioner has failed to do.

3. *The "Blockburger Test" Is Not the Exclusive Standard for Determining Whether a Defendant May Be Consecutively Sentenced*

Consistent with the distinction that has been drawn between the two aspects of double jeopardy we have just discussed, this Court has recognized that the standards for determining what action violates the successive-prosecution protection, and what action violates the multiple-punishment protection, are not necessarily the same. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6. For example, Justice

Brennan, who has consistently maintained that the Double Jeopardy Clause normally requires the prosecution to bring all charges arising out of one transaction in a single trial (see, *e.g.*, *Thompson* v. *Oklahoma*, 429 U.S. 1053 (1977) (Brennan, J., dissenting)), has nevertheless made clear that this is "an entirely different constitutional issue" from multiple punishments, *Abbate* v. *United States*, 359 U.S. 187, 198 (1959) (opinion of Brennan, J.); *Ashe* v. *Swenson*, *supra*, 397 U.S. at 448-460 (concurring opinion), and that the Clause does not, as a general matter, "prohibit the imposition at one trial of cumulative penalties for different crimes committed during one transaction." *Ashe* v. *Swenson*, *supra*, 397 U.S. at 460 n.14 (concurring opinion).

Petitioner nonetheless asserts (Br. 10-13) that the *Blockburger* test is the constitutional criterion for determining whether cumulative punishment may be imposed. But this Court has never had occasion in previous cases to make a definitive pronouncement on the question. Indeed, petitioner fails to cite a single case (and we are aware of none) in which this Court struck down consecutive sentences on constitutional grounds because two offenses were found to be the "same" under the *Blockburger* test. The Court has either upheld multiple punishments after finding that each offense requires proof of different elements, *e.g.*, *Carter* v. *McClaughry*, 183 U.S. 365 (1902); *Morgan* v. *Devine*, 237 U.S. 632 (1915); *Gore* v. *United States*, *supra*, or it has struck down cumulative penalties as a matter of statutory construction,

without deciding whether the offenses are the "same" under *Blockburger*. *E.g.*, *Simpson* v. *United States*, 435 U.S. 6, 11-13 (1978); *Jeffers* v. *United States*, *supra*, 432 U.S. at 155-158 (plurality opinion); *Bell* v. *United States*, *supra*; *Ladner* v. *United States*, *supra*.

Petitioner's argument focuses on certain language in the opinion in *Brown* v. *Ohio*, *supra*. The Court in *Brown* stated, quite correctly, that the *Blockburger* test was established to determine whether two offenses were sufficiently distinguishable to permit the imposition of double punishments. 432 U.S. at 166. The Court then proceeded to adopt that test to adjudicate the question whether Brown's second prosecution was barred. In doing so the Court said: "If two offenses are the same under [the *Blockburger*] test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." *Ibid.* But this statement should not be read to decide that the *Blockburger* test is conclusive with regard to the constitutionality of multiple punishments, for it would then be inconsistent with this Court's recognition elsewhere in *Brown* that "[w]here consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee [against double jeopardy] is limited to assuring that the court does not *exceed its legislative authorization* by imposing multiple punishments for the same offense." 432 U.S. at 165 (emphasis supplied).

Moreover, the language in *Brown* upon which petitioner relies was unnecessary to the Court's decision, since *Brown* was a successive-prosecution case, not a multiple-punishment case. Brown first raised his Double Jeopardy claim when he was indicted for the auto theft following his trial, conviction and punishment for joyriding. 432 U.S. at 163. Later, he pleaded guilty to the theft only on condition that his double jeopardy claim would be considered. When the court rejected that claim, it imposed sentence on the guilty plea, but it is clear that Brown's double jeopardy objection was to the second prosecution; it ripened before his punishment and was independent of the punishment.

In addition, there is evidence in *Jeffers* v. *United States*, *supra*, that petitioner's reliance on the *Brown* dictum is unfounded. In *Jeffers*, the petitioner was successively tried, successively convicted, and cumulatively punished for what this Court assumed to be a greater and a lesser included offense. 432 U.S. at 150 (plurality opinion); *id.* at 158 (opinion of Stevens, J.). The plurality first concluded that petitioner's request for separate trials created an exception to the rule established in *Brown* that the Double Jeopardy Clause prohibited successive prosecutions for a greater and a lesser included offense. *Id.* at 150-154. The plurality then turned to the multiple-punishment question, addressing the defendant's argument that the punishment he had received as a result of two convictions exceeded the maximum punishment authorized for the greater offense.

In addressing this issue, the plurality stated: "The critical inquiry is *whether Congress intended* to punish each statutory violation separately." 432 U.S. at 155 (emphasis added). "If some possibility exists that * * * two statutory offenses are the 'same offense' for double jeopardy purposes, * * * it is necessary to examine the problem closely, in order to avoid constitutional multiple punishment difficulties." *Ibid.* Only after examining the "comprehensive penalty structure" (*id.* at 156), the legislative history (*id.* at 156 & n.26), and the applicability of the policy justifying separate crimes for conspiracy and the substantive offense (*id.* at 156-157) did the plurality conclude that Congress had in fact not intended cumulative punishment for the two particular offenses involved in that case. This approach is consistent with our submission that the permissibility of cumulative punishment is a function of legislative intent.[24]

Harris v. *Oklahoma*, *supra*, is also consistent with our analysis. As we have previously shown (see

[24] Nor does anything in Justice White's separate opinion (432 U.S. at 158) or in Justice Stevens' opinion, joined by three other Justices, lend any support to petitioner's reading of *Brown*. Justice White would have upheld the cumulative punishment, and Justice Stevens concluded that the second prosecution violated the Double Jeopardy Clause. It is thus reasonable to assume that Justice Stevens, and those Justices who joined his opinion, concurred in the reduction of the punishment because they believed the second trial itself was unconstitutional (see note 18, page 33, *supra*), and not necessarily because they believed, as petitioner does, that *Blockburger* governs the constitutionality of cumulative punishments imposed after a *single* trial.

pages 28-29, *supra*), *Harris*, like *Brown*, was a successive prosecution case. The Court in *Harris* did not even address the question whether the two offenses—felony murder and armed robbery—for which the defendant was separately prosecuted were the "same" offense under *Blockburger*. The successive prosecutions in *Harris* were barred, not because the offenses were the "same" (indeed, we submit they are not), but to protect the defendant from having to "run the gantlet" of a second prosecution. In any event, the Court in *Harris* had no occasion to and did not address the question whether consecutive punishments for the murder and the robbery could have been imposed on Harris had he been tried on both charges at a single trial.

Moreover, acceptance of petitioner's position that cumulative punishments are prohibited whenever successive prosecutions would be prohibited presents serious consequences. To illustrate our point, let us return to the hypothetical legislature that enacts a statute providing that whoever commits crime X shall be punished by 10 years in prison and, for committing the lesser included offense of crime Y, shall be punished by an additional five years. See page 40, *supra*. If, as petitioner claims, the *Blockburger* test governs the constitutionality of cumulative punishment, a defendant who committed both offenses could be sentenced only to 10 years in prison. This result would be squarely contrary to the legislature's unmistakable intent. The fact that the legislature chose to express that intent in a way that did not define

two distinct crimes under the *Blockburger* analysis would be no reason to hold that the additional five-year sentence is prohibited by the Double Jeopardy Clause. The *Blockburger* test, after all, was devised as a means of ascertaining legislative intent. *Iannelli* v. *United States, supra,* 420 U.S. at 785 n.17. To hold that legislative intent, no matter how clearly expressed, will be ignored unless it conforms to the *Blockburger* test would unjustifiably stand the *Blockburger* test on its head. It is one thing to hold, as *Blockburger* did, that the presence of distinct statutory elements demonstrates a legislative intent to allow cumulative punishment; it is quite another to use the distinct-offense test of *Blockburger* to thwart legislative intent, and this Court has never done so.

Our concern with petitioner's approach is not merely hypothetical. Under petitioner's analysis, a federal district court could never impose consecutive sentences upon a defendant convicted both of using or carrying a firearm in the commission of a federal felony pursuant to 18 U.S.C. 924(c) and of the underlying felony, despite statutory language unequivocally expressing congressional intent to permit such sentences; the predicate felony is, after all, a "lesser included offense" of the firearms charge in exactly the same sense that rape is a lesser included offense of felony murder, viz., the jury necessarily must find the commission of an underlying felony to convict under Section 924(c). Similar problems may arise with respect to a number of other federal statutes, *e.g.*, 18 U.S.C. 1962 (conduct of enterprise through a pattern

of racketeering activity); 21 U.S.C. 848 (continuing criminal enterprise involving substantive narcotics offenses), as well as with state laws.[25]

Petitioner, however, appears to qualify his absolute "rule" by conceding (Br. 23 n.10) that it may indeed be possible to punish consecutively for violations of what he calls greater and lesser included offenses (but what more precisely may be termed "compound" and "predicate" offenses) in certain limited circumstances where the statutory scheme resembles "traditional enhancement provisions." But if Congress could have accomplished the result through an enhanced sentencing procedure, it should be permitted, if it chooses, to create a separate felony firearm offense (or in this case, a separate felony murder offense), since the effect and purpose are precisely the same as those of the "traditional enhancement provisions." Petitioner's approach simply fails to acknowledge the independent role of the legislature in defininining conduct as criminal and in determining appropriate sentences. If the enhanced sentence statute is constitutional (and petitioner appears to concede as much), it is because the legislative intent to

---

[25] In *Cassius* v. *Arizona*, cert. dismissed as improvidently granted, 420 U.S. 514 (1975), the Court had before it an Arizona statute making it an offense to commit a felony while released on bail, and providing additional punishment for that offense. The Supreme Court of Arizona had ruled that consecutive punishment in that instance did not offend double jeopardy (110 Ariz. 485, 520 P.2d 1109 (1974)); under petitioner's argument, the statutory provision of separate punishment would be unconstitutional.

punish cumulatively renders inapplicable any independent constitutional policy against multiple punishment. And if the constitutional question is one of ascertaining legislative intent, then Congress should be free to express its intent to punish consecutively greater and "lesser included" offenses.

Petitioner's argument draws its support largely from labels ("same offense", "greater and lesser-included offenses") and isolated statements taken from prior opinions of this Court addressing problems essentially different from those of this case. Apart from its logical flaws, the argument is contrary to common sense. Rape (or burglary, or kidnapping, or arson) combined with homicide makes for a very odd pair of greater and lesser "included" offenses. Common sense tells us that assault is in fact a lesser included offense of assault with a deadly weapon, because one cannot assault with a deadly weapon unless one assaults. Similarly, manslaughter is in fact a lesser included offense of murder, because one cannot kill with deliberation or malice aforethought unless one kills. When we look to the *Blockburger* test to define "lesser included offenses" such as these, we merely confirm what common sense already tells us. On the other hand, common sense tells us that rape and murder are not greater and lesser included offenses in any real sense, for one can certainly rape without killing or kill without raping. If the rape is a lesser "included" offense of murder it is so, not because it necessarily took place as part of the killing, but only

because the legislature has defined first degree murder to include a killing committed in the course of committing a rape.

But even assuming that the *Blockburger* test as applied to *necessarily* included offenses sets a constitutional limit on multiple punishment and thus should, for example, bar consecutive sentences for assault and assault with a deadly weapon, the same result does not necessarily follow with respect to "felony murder" and the felony that is proven along with it.[28] *Blockburger* was not devised to limit punishments for "compound" and "predicate" offenses such as felony murder and the underlying felony, and, more importantly, it does not reflect reality when it is applied in that context. Indeed, no "lesser included offense" rule can serve well in the felony murder context, because rape (or burglary or kidnapping) is never a truly included offense of

---

[28] The question of consecutive sentences for true greater and lesser included offenses is unlikely to arise with any great frequency, since the defendant may avoid the problem by requesting the trial court to instruct the jury that it need not deliberate on the lesser included offense if it finds the defendant guilty of the greater offense. See *Jeffers* v. *United States*, *supra*, 432 U.S. at 153-154 (plurality opinion). Cf. *United States* v. *Gaddis*, 424 U.S. 544, 550 (1976). Petitioner could not ask for such an instruction in this case because in the District of Columbia as in other jurisdictions, a defendant charged with first degree (felony) murder is not entitled to a lesser included offense instruction with respect to the predicate felony (see page 67 *infra*).

murder; they are distinct acts, one committed independently of the other. The legislature has simply made the felony do service as a sort of constructive murderous intent, in order to upgrade what might otherwise be a second degree murder or a manslaughter (see pages 62-67, *infra*). But the mere fact that evidence of the same criminal intent—to commit the underlying felony—suffices to prove both felony murder and the underlying felony when both are separately charged does not bar the imposition of consecutive sentences. "[T]he test is not whether the criminal intent is one and the same and inspiring the whole transaction, but whether separate acts have been committed with the requisite criminal intent and are such as are made punishable by the act of Congress." *Morgan* v. *Devine*, *supra*, 237 U.S. at 640.

The question, at bottom, should always be legislative intent. Congress and other legislatures that follow the common law rule (see pages 63 to 66, *infra*) allow the jury to infer intent to kill from what it must first find to be intent to commit rape or another felony, but the legislature has not thereby directed the court to ignore the commission of the felony when time comes to sentence for murder. The fact that the definition of felony murder incorporates commission of the felony itself is different from the fact that the definition of assault with a deadly weapon incorporates the definition of assault. Assault with a

deadly weapon, or assault with intent to kill, is an aggravated form of assault, and thus punishable more severely than simple assault. But killing a person is not an aggravated form of rape; the fact that the prosecution must prove the rape on its way to proving the killing if it is to secure a first degree murder conviction without proof of deliberation or malice may be a restriction on the prosecution, but it is not a restriction on the sentencing court. The court must look to whether the legislature has provided for multiple punishments.

II

THE DETERMINATION BY THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA THAT THE APPLICABLE LOCAL STATUTES AUTHORIZE CONSECUTIVE PUNISHMENTS FOR RAPE AND FOR A MURDER COMMITTED IN THE COURSE OF THAT RAPE IS CORRECT AND SHOULD NOT BE OVERTURNED

We have argued above that the dispositive question in determining whether the Double Jeopardy Clause prohibits a particular set of consecutive punishments, imposed in a single sentencing proceeding following a single trial that results in conviction of two or more offenses arising out of the same episode, is whether the total sentence exceeds that authorized by the legislature in the circumstances. In the absence of direct evidence of legislative intent, the

Blockburger test is an important device for answering the question; but, if we are correct, it is not invariably conclusive. Cases such as *Simpson* v. *United States*, *supra*, show that cumulative punishment may be barred, in accordance with the will of the legislature, for offenses that are "different" under the *Blockburger* test. Conversely, multiple punishments (such as fine, imprisonment, and probation or special parole) are routinely imposed for a single offense, when authorized by statute. The same direct focus upon legislative authorization, we have argued above, is the governing inquiry in considering the allowable punishment for separately defined offenses, whether or not they are arguably the "same offense" under the constitutional analysis governing the permissibility of successive prosecutions.

In the present case, the District of Columbia Court of Appeals, construing criminal statutes applicable solely to the District of Columbia, determined that the consecutive sentences imposed upon petitioner were authorized under those statutes. The correctness of that construction was not presented to this Court in the petition for a writ of certiorari as an issue for review in this case. Both these considerations strongly suggest that this Court should not now undertake to review the conclusion of the court below that the sentences imposed herein were legislatively authorized, but that it should decide this case on the premise that this conclusion was correct as a matter of statutory construction. But if this Court

does decide to review the issue of statutory authorization for the sentence imposed upon petitioner, we argue below that the court of appeals was correct in concluding that the sentence was consonant with legislative authorization.

A. This Court Should Not Review The Construction Given By The Highest Court Of The District Of Columbia To A Statute Of Purely Local Application

In his petition for certiorari, the sole question presented by petitioner involved the constitutionality, under the Double Jeopardy Clause of the Fifth Amendment, of the consecutive sentences imposed upon him for rape and first degree (felony) murder. In his brief on the merits, however, petitioner for the first time argues (Br. 26-39) that Congress did not intend to authorize the punishment imposed upon him and that the court of appeals erred in reaching the contrary conclusion. We submit that this Court should not undertake to review the non-constitutional aspects of the court of appeals' decision, which involve the construction of statutes applicable solely within the District of Columbia.

Petitioner contended below that his conviction for rape, and his consecutive sentence therefor, should be vacated because under District of Columbia law the rape merged with the felony murder conviction; he argued also that such a result was required by the Double Jeopardy Clause. Pet. Ct. App. Br. 76-81. The court of appeals rejected this argument. It recognized that "[m]erger of two offenses is ordinarily appropriate when the lesser offense consists entirely

of some but not all of the elements of the greater offense," A. 14 (citations omitted). But, said the court, "[i]n determining whether merger is appropriate, this court has refused to analyze solely by abstract consideration of the statutes involved or the wording of the indictment, and has looked instead to the societal interests protected by the statutes under consideration." *Id.* at 15 (citations omitted).

The court then held that the societal interests served by the rape statute (to protect women from sexual assault) and that served by the felony murder statute (to protect human life) are "separate and distinct" (A. 15) and that there was no evidence to suggest that Congress intended the offenses to merge (*id.* at 16). The court of appeals also concluded that "while the underlying felony is an element of felony murder it serves a more important function as an intent-divining mechanism" (*id.* at 17). Thus, the court held, "rape is not a lesser included offense of felony murder and * * * merger is inappropriate even absent societal interest analysis." *Ibid.* The court of appeals thus took two paths to arrive at the conclusion that Congress had not intended felony murder and the underlying felony to merge; each was deemed to dictate its holding that consecutive sentences for the two offenses were authorized.

Whether the foregoing ruling be viewed as one of statutory construction or of local common law, this Court should accept it as dispositive of the nonconstitutional issues in this case. It has long been the practice of this Court to decline review of decisions of the District's courts on common-law questions of evidence and substantive criminal law (see, *e.g.*, *Griffin* v. *United States*, 336 U.S. 704, 717-718 (1949); *Fisher* v. *United States*, 328 U.S. 463, 476 (1946)), and the Court has recently stated that "the same deference is owed the courts of the District with respect to their interpretation of Acts of Congress directed toward the local jurisdiction." *Pernell* v. *Southall Realty*, 416 U.S. 363, 367 (1974). Particularly in light of the reorganization of the District's court system in 1970,[27] which was designed in substantial part to enhance the status of the District of Columbia Court of Appeals and to place it on a footing comparable to that of the highest court of a state,[28] "the decisions of the District of Columbia Court of Appeals on matters of local law—both common law and statutory law—will be treated by this Court in a manner similar to the way in which we treat decisions of the highest court of a State on questions of state law" (*id.* at 368).

These principles clearly dictate that the Court should not in this case consider petitioner's contention that the court of appeals misconstrued local law in holding that cumulative punishments were statutorily authorized. While the Court retains power under Article III to consider the claim, such consideration

---

[27] See generally District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473.

[28] See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 35 (1970); cf. 28 U.S.C. 1257.

would be appropriate only in " 'exceptional situations where egregious error has been committed' " (*Pernell* v. *Southall Realty*, *supra*, 416 U.S. at 369, quoting *Fisher* v. *United States*, *supra*, 328 U.S. at 476). This is plainly not such a situation.

B. Petitioner's Failure To Raise The Statutory Construction Issue In His Petition Also Justifies A Refusal To Review It

Petitioner presented one question in his petition for certiorari: "Whether the doctrine of merger of offenses, an integral part of the Double Jeopardy Clause of the Fifth Amendment to the Federal Constitution, precludes the * * * trial court[] from imposing consecutive sentences on * * * petitioner Whalen for felony-murder and the underlying offense of rape * * *" (Pet. 3-4). He contended that the conclusion of the District of Columbia Court of Appeals that the two offenses did not merge was constitutional error and that, under the *Blockburger* test, the offenses "are considered 'the same offense' because one 'merges' into the other" (*id.* at 8). Petitioner concluded that "because proof of the felony supplies vital elements of the first degree murder charge * * * cumulative punishment for both felony-murder and the underlying felony violates the Double Jeopardy Clause" (*id.* at 10-11).

Thus, until now petitioner has taken no issue with the court of appeals' conclusion that Congress intended to permit cumulative punishments for felony murder and the underlying felony. The question he presented was simply whether cumulative punishment violates the Double Jeopardy Clause. Only in

his brief on the merits has he rephrased the "Question Presented" (compare Pet. 3-4 with Br. 2) and argued that Congress did not intend to authorize cumulative punishment. (The arguments set forth at Br. 26-39 were not presented to the court of appeals either).

It is axiomatic that this Court will ordinarily consider "[o]nly the questions set forth in the petition or fairly comprised therein * * *." Sup. Ct. R. 23(1)(c). See, *e.g.*, *General Talking Pictures Co.* v. *Western Electric Co.*, 304 U.S. 175, 177-178 (1938); R. Stern & E. Gressman, *Supreme Court Practice* § 6.27 (5th ed. 1978). Although the question of the existence of legislative authorization is critical to any inquiry into the constitutional permissibility of cumulatve punishments, it cannot be said that the question whether Congress intended to permit cumulation of punishment for felony murder and the underlying felony is fairly comprised within the question whether the Double Jeopardy Clause bars such punishment because of the nature of the offenses themselves. In other words, the petition was predicated entirely on the assumption that neither the legislature nor the courts may constitutionally bring about consecutive sentences for rape and felony murder because the offenses are the "same" for double jeopardy purposes (see also Br. 22-24). The answer to this question does not inherently depend upon, or entail, the kind of inquiry into legislative debate and intentions that petitioner now invites the Court to undertake.

It is true that the Court's practice of declining to review questions not presented in the petition is not without exceptions for extraordinary circumstances (see discussion in Stern & Gressman, *supra*). In the present case, however, no such circumstances exist; to the contrary, the fact that the arguments petitioner now presents for the first time are addressed to matters of local law reinforces the propriety of adhering in this case to the general principle that questions not presented in the petition will not be decided by the Court.

C. Congress Intended To Allow Consecutive Sentences For Felony Murder and Rape

Should the Court nevertheless choose to review the court of appeals' holding that the local District of Columbia statutes authorize the sentences imposed upon petitioner, we submit that an examination of congressional intent demonstrates that the sentences are legislatively authorized.

The inquiry into whether Congress has authorized cumulative punishment is generically similar to any other inquiry to determine congressional intent. After analyzing the language of the statutes themselves, one looks to the pertinent legislative history, *Simpson* v. *United States*, *supra*, 435 U.S. at 13; the purpose and structure of the statutes, *Iannelli* v. *United States*, *supra*, 420 U.S. at 787-789; their historical ancedents at common law, *Callanan* v. *United States*, 364 U.S. 587, 589-591 (1961); the circumstances under which they were enacted, *Gore* v. *United States*, *supra*, 357 U.S. at 390-391; *Simpson* v. *United States*,

supra, 435 U.S. at 18 (Rehnquist, J., dissenting); and appropriate canons of statutory construction in the absence of a "discernible legislative judgment," *Iannelli* v. *United States*, *supra*, 420 U.S. at 786. As we show in this section, such an inquiry in this case demonstrates that Congress intended to authorize courts in the District of Columbia, in their discretion, to impose consecutive sentences in the circumstances of this case.

At the outset of this inquiry, we acknowledge that "[w]hen Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." *Bell* v. *United States*, 349 U.S. 81, 83 (1955); *Simpson* v. *United States*, *supra*, 435 U.S. at 14-15. But as this Court has also recognized, the rule of lenity, "as is true of any guide to statutory construction, only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Callanan* v. *United States*, 364 U.S. 587, 596 (1961) (footnote omitted). See also *United States* v. *Culbert*, 435 U.S. 371, 379 (1978); *United States* v. *Batchelder*, No. 78-776 (June 4, 1979), slip op. 7. "The rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Callanan* v. *United States*, *supra*, 364 U.S. at 596. See also *Scarborough* v. *United States*, 431 U.S. 563, 577 (1977).

1. *Felony Murder And The Underlying Felony Were Discrete Offenses At Common Law*

The statute under which petitioner was convicted of first degree murder (D.C. Code Ann. § 22-2401) provides four definitions of first degree murder: a purposeful killing with deliberate and premeditated malice; a killing by means of poison; a purposeful killing in the course of committing (or attempting to commit) any felony; and a homicide, without the purpose to kill, in the course of committing (or attempting to commit) arson, rape, mayhem, robbery, kidnapping, or, if armed, housebreaking. In connection with the last of these definitions, it has been stated: "[B]y eliminating the element of 'purpose' with respect to these * * * serious felonies, Congress intended to apply the common law felony murder rule to them—that is, that a homicide committed in the course of their perpetration is murder because the 'malice' required for murder [at common law] can be *implied* from the commission of the felony." *United States* v. *Branic*, 495 F.2d 1066, 1069 (D.C. Cir. 1974) (emphasis in original; footnotes omitted). This conclusion can be illuminated by a brief examination of felony murder as it took shape in the common law.

At common law, offense categories were relatively few and distinct, *Ashe* v. *Swenson*, *supra*, 397 U.S. at 445 n.10, and the law distinguished, for example, among rape, arson and murder. See Note, *supra*, 75 Yale L. J. at 279. Homicides were divided into two categories, murder and manslaughter, with mur-

der requiring a showing of malice. See 4 W. Blackstone, *Commentaries* * 190. Malice could be either express or implied, and a killing committed in the course of a felony was considered murder because malice was implied by the actor's intent to commit the felony.[29] See *United States* v. *Branic*, *supra*, 495 F.2d at 1069; *United States* v. *Greene*, 489 F.2d 1145, 1168 (D.C. Cir. 1973) (Bazelon, C. J.; statement of reasons for granting rehearing en banc), cert. denied, 419 U.S. 977 (1974); *United States ex rel. Jackson* v. *Follette*, 462 F.2d 1041, 1047 (2d Cir.), cert. denied, 409 U.S. 1045 (1972); *Fuller* v. *United States*, 407 F.2d 1199, 1228 (D.C.

---

[29] See 4 W. Blackstone, *supra* at 198-201:

> Express malice is when one, with a sedate deliberate mind and formed design, doth kill another; which formed design is evidenced by external circumstances discovering that inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. * * *
>
> * * * * *
>
> Also in many cases where no malice is expressed the law will imply it, as, where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. * * * And if one intends to do another felony, and undesignedly kills a man, this is also murder. Thus if one shoots at A. and misses him, but kills B., this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A., and B., against whom the prisoner had no malicious intent, takes it, and it kills him; this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman; this is murder in the person who gave it.

Cir. 1968) (en banc), cert. denied, 393 U.S. 1120 (1969). Even an accidental killing, if perpetrated in the course of another felony, was deemed murder rather than manslaughter, on the theory of implied malice. See *Shanahan* v. *United States*, 354 A.2d 524, 526 (D.C. App. 1976); Arent and MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes*, 20 Cornell L. Q. 288, 292 (1935); Perkins, *A Re-examination of Malice Aforethought*, 43 Yale L. J. 537, 557-558 (1934).[30]

When homicides were subdivided by statute into murder in the first and second degrees and manslaughter, "the doctrine of felony murder was preserved, and the underlying felony was viewed as providing the 'premeditation' and 'deliberation' otherwise required for first degree murder, as well as malice, where necessary." *United States* v. *Greene*, *supra*, 489 F.2d at 1168 (Bazelon, C.J.). See *United States ex rel. Jackson* v. *Follette*, *supra*, 462 F.2d at 1048; *Commonwealth* v. *Watkins*, 379 N.E.2d 1040, 1049 (Mass. 1978); Wechsler and Michael, *A Rationale of the Law of Homicide: I*, 37 Colum. L. Rev. 701, 703-707 (1937); Arent and MacDonald, *supra*, 20 Cornell L. Q. at 294-295.

---

[30] See 4 W. Blackstone, *supra*, at 192-193:

> And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.

Under the common law, therefore, murder was but one offense, and the felony murder rule simply provided an alternative means of establishing malice.[31] Consistent with this view, the common law form of indictment for murder, charging a premeditated killing with malice aforethought, is sufficient in most jurisdictions to charge and convict a defendant for felony murder. See, *e.g.*, *Commonwealth* v. *Bastone*, 466 Pa. 548, 353 A.2d 827 (1976); *State* v. *Stancliff*, 467 S.W.2d 26 (Mo. 1971); *Rogers* v. *State*, 83 Nev. 376, 432 P.2d 331 (1967); *Allen* v. *State*, 199 Kan. 147, 427 P.2d 598 (1967); *State* v. *Reyes*, 209 Or. 595, 308 P.2d 182 (1957); *People* v. *Lytton*, 257 N.Y. 310, 314-315, 178 N.E. 290, 292 (1931); *People* v. *Nichols*, 230 N.Y. 221, 226-227, 129 N.E. 883, 884 (1921); Arent and MacDonald, *supra*, 20 Cornell L. Q. at 310 & n.127.[32] Because felony murder is one of several forms of first degree murder, where felony murder is charged the jury may be instructed on second degree murder or manslaughter as lesser in-

---

[31] Because the intent to commit the underlying felony supplies the malice necessary to convict for murder, the underlying felony need not be consummated in order to invoke the felony murder doctrine. See D.C. Code Ann. § 22-2401 ("perpetrating or * * * attempting to perpetrate" an underlying felony). See also, *e.g.*, *State* v. *Pittman*, 118 Ariz. 71, 574 P.2d 1290, 1294 (1978).

[32] See also *State* v. *Barton*, 5 Wash.2d 234, 239, 105 P.2d 63, 67 (1940) (information charging a defendant with a killing with premeditation *and* while engaged in the commission of a robbery is not duplicitous since it charges only one crime, murder in the first degree; the reference to robbery is merely incidental to, and descriptive of, the murder).

cluded offenses, see *Fuller* v. *United States*, *supra*, 407 F.2d 1229-1230; Arent and MacDonald, *supra*, 20 Cornell L. Q. at 310 & n.132; cf. *Green* v. *United States*, *supra*, 355 U.S. at 194 n.14, and a defendant may not be separately punished for felony murder and any lesser degree of homicide.

On the other hand, the underlying felonies have not historically been considered lesser included offenses of felony murder. While the underlying felonies inherently involve a substantial risk to human life, at the same time these felonies are necessarily separate and distinguishable from the homicidal assault. See Arent and MacDonald, *supra*, 20 Cornell L. Q. at 290-291, 298-301; Wechsler and Michael, *supra*, 37 Colum. L. Rev. at 713-716, 744-745 & n.161; Perkins, *supra*, 43 Yale L. J. at 560-563. The reason for this limitation has been cogently stated (Arent and MacDonald, *supra*, 20 Cornell L. Q. at 298):

> Every time a homicide which is not justifiable or excusable is committed, the killer may be said to have been engaged in a felony. To hold him guilty of felony murder, however, would eliminate all existing distinctions between murder and manslaughter and their various degrees. A necessary qualification of the felony murder rule, therefore, is that the felony in which the defendant was engaged must have been independent of the homicide.

Thus, in the District of Columbia, as in other jurisdictions, the underlying felony in a felony murder prosecution must have elements "so distinct from that of the homicide as not to be an ingredient of the homicide." *Blango* v. *United States*, 373 A.2d 885, 889 (D.C. App. 1977). See also *State* v. *Foy*, 224 Kan. 558, 582 P.2d 281, 288 (1978); *Garrett* v. *State*, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978); *People* v. *Moran*, 246 N.Y. 100, 102, 158 N.E. 35, 36 (1927); *People* v. *Nichols*, *supra*, 230 N.Y. at 226, 129 N.E. at 884. Furthermore, in the District of Columbia (and elsewhere) the defendant in a trial for felony murder is not entitled to have the jury instructed that the underlying felony is a lesser included offense of felony murder. See, *e.g.*, *Wheeler* v. *United States*, 165 F.2d 225, 229 (D.C. Cir. 1947), cert. denied, 333 U.S. 830 (1948); *Candler* v. *State*, 266 Ind. 440, 363 N.E.2d 1233, 1243 (1977); *People* v. *Nichols*, *supra*, 230 N.Y. at 225-228, 129 N.E. at 884-885.

Thus, felony murder and the underlying felonies traditionally have been regarded as discrete and independent offenses. Although lesser degrees of homicide have been considered lesser included offenses of felony murder, the underlying felonies have not been so regarded. And it was this historical background, as the court of appeals concluded in *Branic*, *supra*, that Congress intended to apply in the law of felony murder in the District of Columbia. As we now show, Congress, consistently with this history, considered felony murder and the underlying felonies as defined in the District of Columbia Code to be separate offenses for punishment purposes.

2. The History of the District's First Degree Murder Statute Shows That Felony Murder And Rape Are Separately Punishable Offenses

a. Congress first enacted a general code for the District of Columbia in 1901. Act of March 3, 1901,

ch. 854, 31 Stat. 1189. That code provided that "[w]hoever, being of sound memory and discretion purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree." Section 798, 31 Stat. 1321. Murder in the first degree carried a mandatory sentence of death by hanging.[33] Section 801, 31 Stat. 1321. Rape was made punishable by five to 30 years' imprisonment or, if the jury so provided, death by hanging. Section 808, 31 Stat. 1322.[34] In enacting the code, Congress provided that the common law would remain in force to the extent consistent with the code. Section 1, 31 Stat. 1189. There was no specific provision governing cumulation of sentences, although cumulation was clearly contemplated,

[33] Murder in the second degree was defined as any other homicide with malice aforethought (Section 800, 31 Stat. 1321) and was punishable by imprisonment for 20 years to life (Section 801, 31 Stat. 1321). Manslaughter was punishable by up to 15 years' imprisonment, or a fine of $1,000, or both (Section 802, 31 Stat. 1321).

[34] Until 1970, the punishment provided for rape under the D.C. Code remained unchanged. In response to *United States* v. *Jackson*, 390 U.S. 570 (1968), which held a similar federal death penalty provision invalid, Congress amended the rape statute to permit the imposition of a sentence of imprisonment "for any term of years or for life." Act of July 29, 1970, Pub. L. No. 91-358, Section 204, 84 Stat. 600. See H. R. Rep. No. 91-907, 91st Cong., 2d Sess. 66-67 (1970). Where a life sentence is imposed for rape, D.C. Code Ann. § 24-203(a) provides that the minimum term of imprisonment shall not exceed 15 years.

because Congress provided that "[c]umulative sentences aggregating more than one year shall be deemed one sentence" for the purpose of determining where the sentence was to be served. Section 934, 31 Stat. 1341.

It is not surprising that in 1901 Congress did not address the question whether a conviction of first degree murder (whether by means of felony murder or with deliberate and premeditated malice) could run consecutively to the sentence for another felony. The mandatory sentence for first degree murder was death; that sentence made any question of imprisonment for another crime superfluous.[35]

b. In 1940, Congress amended the 1901 murder statute to the form now contained in D.C. Code Ann. § 22-2401. Act of June 12, 1940, ch. 339, 54 Stat. 347.[36] What legislative history there is indicates that the change was effected to eliminate any element of purpose from felony murder. The Attorney General, recommending the change, stated that the word "purposely," placed in the statute so as to apply to felony murder as well as other types of first degree murder, had "no proper function" in connection with the

[35] Although in one English case, the defendant was sentenced to be "drawn for treason, hanged for robbery and homicide and disemboweled for sacrilege, beheaded as an outlaw and quartered for divers depredations." Note, *supra*, 75 Yale L.J. at 300, quoting 2 F. Pollock and F. Maitland, *History of English Law* 501 (2d ed. 1905).

[36] Congress carried forward the definition of second degree murder as contained in the 1901 Act, and as now found in D.C. Code Ann. § 22-2403.

former, and he recommended that the statute be changed to conform to the general practice of not requiring a purposeful killing for a felony murder conviction. S. Rep. No. 1175, 75th Cong., 1st Sess. 2 (1937). Congress accepted this proposal only in part, eliminating the requirement of a "purposeful" killing only for the six serious felonies and retaining it for homicides committed in the course of other felonies. D.C. Code Ann. § 22-2401. Because the mandatory death penalty remained unchanged for first degree murder, there was no more reason in 1940 than there had been in 1901 to deal with cumulative sentences, and Congress apparently did not consider the matter.

c. In 1962, Congress replaced the mandatory death penalty for first degree murder with the present language of D.C. Code Ann. § 22-2404, which allows, as an alternative, a sentence of 20 years to life imprisonment. Act of March 22, 1962, Pub. L. No. 87-423, Section 1, 76 Stat. 46. With the possibility of parole after 20 years for those convicted of first degree felony murder, the question whether such a sentence could run consecutively to a sentence imposed for the underlying felony became relevant for the first time. But Congress concentrated on the merits of abolishing the mandatory death sentence and did not expressly address the matter of consecutive sentences. Both the language and the history of Section 2404 indicate, however, that Congress intended the statutory penalties to apply with equal force to all defendants convicted of first degree mur-

der, whether their convictions rested upon the felony murder or premeditated murder provisions of Section 2401.

Section 2404 provides, with respect to the sentence of life imprisonment authorized for first degree murder:

> Notwithstanding any other provision of law, a person convicted of first degree murder and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of twenty years from the date he commences to serve his sentence.

This language does not differentiate between defendants convicted of first degree murder under a "felony murder" theory and those convicted of first degree murder upon proof of "deliberate and premeditated" homicide. The penalty provisions refer simply to "a person convicted of first degree murder." Indeed, as petitioner himself concedes (Br. 35), the legislative record manifests Congress' belief that a person convicted of felony murder would be subject to the same penalty as one convicted of premeditated murder. See, *e.g.*, 108 Cong. Rec. 4128-4129 (1962) (remarks of Sen. Hartke). Since it is beyond serious dispute that Congress intended to permit imposition of consecutive sentences when a defendant is convicted of premeditated murder and another felony, such as rape, committed as part of the same transaction, the absence of any distinction between felony murder and premeditated murder strongly suggests that Congress must also have intended to authorize

cumulative punishments for felony murder and the underlying felony.[37]

The legislative history conclusively demonstrates that the purpose of the mandatory 20-year minimum sentence was to distinguish between the penalties for first and second degree murder. See S. Rep. No. 373, 87th Cong., 1st Sess. 2 (1961); H. R. Rep. No. 677, 87th Cong., 1st Sess. 2 (1961); 107 Cong. Rec. 12154 (1961) (remarks of Rep. Abernethy). Under the applicable provisions of law (which are still in effect), a defendant convicted of murder in the second degree could have received a sentence not exceeding 15 years to life imprisonment. See D.C. Code § 22-2403 and D.C. Code § 24-203(a). To ensure that all defendants convicted of murder in the first degree would be treated more severely than those convicted of second degree murder, "the language of this legislation would distinguish the parole eligibility of one sentenced to life imprisonment as the result of a first degree murder conviction. *Such an individual must serve at least twenty years before being eligible for the consideration of parole, notwithstanding any other provision of law,*" H. R. Rep. No. 677, *supra*, at 2 (emphasis added). See S. Rep. No. 373, *supra*,

[37] In support of the proposition that Congress believed persons convicted of felony murder deserving of less punishment than those convicted of premeditated murder, petitioner cites (Br. 36 n.23) a passage from a letter by former United States Attorney Acheson in support of the legislation. But the passage merely points out that a discretionary death penalty is preferable to a mandatory one because it allows for some variation in punishment based on the mitigating or aggravating circumstances of a given case.

at 2; 107 Cong. Rec. 12154 (1961) (Rep. Abernethy); 108 Cong. Rec. 4131 (1962) (Sen. Hartke).

It would totally undermine Congress' clear intent to deal more harshly with first degree murders to suggest, as does petitioner, (Br. 30 n.15), that while rape and second degree murder may always be punished consecutively [38] (for a total sentence of 30 years to life imprisonment), rape and first degree murder may not be consecutively punished (resulting in a maximum sentence of only 20 years to life) whenever the first degree murder conviction is based on a felony murder theory.[39] Moreover, by setting a minimum of "at least" 20 years before a defendant becomes eligible for parole consideration, Congress clearly contemplated the possibility that sentences for first degree murder, including felony murder, would run consecu-

[38] See *United States* v. *Butler*, 462 F.2d 1195 (D.C. Cir. 1972), upholding consecutive sentences for second degree murder, housebreaking and larceny.

[39] Contrary to petitioner's assertion (Br. 35 n.21) a conviction for felony murder does not necessarily imply a separate conviction for the underlying felony. It is only when the underlying felony is charged in a separate count of the indictment that a jury may convict, and sentence may be imposed, on both charges. The decision whether to charge the underlying felony under a separate count is a matter within the discretion of the prosecution. Thus, it is not surprising that, as petitioner notes (Br. 37), the debate on Senator Morse's proposed amendments (that life imprisonment without the possibility of parole be included as a sentencing option in addition to, or instead of, death and 20 years to life imprisonment) includes no comment concerning the cumulation of penalties for murder and another felony, since the debate focused on the appropriate punishment for one convicted only of the single offense of murder in the first degree.

tively to sentences for other crimes, presumably including the enumerated felonies underlying felony murder.

This development of the law of first degree murder demonstrates that Congress intended rape and first degree (felony) murder to constitute separate, and separately punishable, offenses. As petitioner concedes (Br. 30 n.15), Congress intended to punish the felony separately from the homicide when it was committed together with a second degree murder, and there is no evidence that Congress intended a different (and more lenient) rule for first degree murder.

3. *The Murder and Rape Statutes Protect Different Societal Interests*

Historical development and legislative history are not the only means of ascertaining legislative intent in this area. Another means of determining whether the legislature intended to punish violations of two statutory provisions separately is to ask whether the statutes are designed to implement different social policies. "If the same acts violate different federal statutes protecting separate federal interests those interests can be adequately protected at a single trial by the imposition of separate sentences for each statute violated." *Abbate* v. *United States*, *supra*, 359 U.S. at 200 (separate opinion of Brennan, J.). See *Ashe* v. *Swenson*, *supra*, 397 U.S. at 460 n.14 (Brennan, J., concurring).

The societal interest analysis has been employed to ascertain, with respect to a variety of statutes,

whether Congress intended to authorize the imposition of consecutive sentences. See, *e.g.*, *United States* v. *Butler*, 462 F.2d 1195, 1199 (D.C. Cir. 1972) (second degree murder, housebreaking, and larceny); *Irby* v. *United States*, 390 F.2d 432, 433-434 (D.C. Cir. 1967) (en banc) (housebreaking and robbery); *Rouse* v. *United States*, 402 A. 2d 1218 (D.C. App. 1979) (armed robbery and carrying a pistol without a license). See also Note, *supra*, 75 Yale L.J. at 320-321; Kirchheimer, *The Act, The Offense and Double Jeopardy*, 58 Yale L.J. 513, 522-523 (1949).[40] In the present case, the court of appeals concluded from this analysis that

> the societal interests which Congress sought to protect by enactment of D.C. Code 1973, § 22-2401 (felony murder) and § 22-2801 (rape) are separate and distinct. The rape statute is to protect women from sexual assault. The felony murder statute purports to protect human life * * *.

(A. 15; footnote omitted).[41] See also *United States* v. *Greene*, *supra*, 489 F. 2d at 1169 (Bazelon, C.J.).

---

[40] The societal interest test has also been employed by courts to determine whether two offenses are related to each other as greater and lesser included offenses for jury instruction purposes. (Fed. R. Crim. P. 31(c)). See *United States* v. *Stolarz*, 550 F.2d 488, 491 (9th Cir. 1977); *United States* v. *Whitaker*, 447 F.2d 314, 318 (D.C. Cir. 1971); *Hall* v. *United States*, 343 A.2d 35, 39 (D.C. App. 1975).

[41] The District of Columbia Court of Appeals has upheld separate convictions for felony murder and the underlying felony on this theory in other cases. See *McFadden* v. *United*

Petitioner asserts (Br. 28), however, that it is equally plausible to believe that the societal interests in guarding against rape and murder are both fully protected by the felony murder provision. But Congress made the felony murder provision of Section 2401 applicable whether or not the underlying felony was actually consummated (see note 21, *supra*). In addition, as Blackstone long ago observed (see note 29, *supra*) and the statute itself implies, the felony murder provision serves to protect the lives not only of the victim of the underlying felony but of all persons in close proximity to the commission of the felony, even including accomplices. These two factors —that an attempt to commit a felony is sufficient to trigger the provisions of the first degree murder statute and that the victims of the murder and of the underlying felony may differ—strongly indicate that Congress had in mind the protection of separate interests when it separately enacted the felony murder and the rape statutes.[42]

States, 395 A.2d 14, 17-18 (1978) (felony murder/mayhem); *Ellis* v. *United States*, 395 A.2d 404, 413 (1978) (felony murder/armed robbery); *Waller* v. *United States*, 389 A.2d 801, 808-809 (1978), appeal pending, No. 78-5928 (felony murder/attempted armed robbery); *Pynes* v. *United States*, 385 A.2d 772, 773-774 (1978), pet. for cert. pending, No. 78-5471 (see note 1, *supra*) (felony murder/armed kidnapping); *Harris* v. *United States*, 377 A.2d 34, 38 (1977) (felony murder/burglary); *Blango* v. *United States*, 373 A.2d 885, 889 (1977) (same).

[42] Contrary to petitioner's contention (Br. 29), there is nothing in Wechsler and Michael, *supra*, that suggests that felony murder necessarily embraces the same interests as the

Furthermore, while there is an inevitable overlap in the interests served by the felony murder provision and the various predicate felony statutes, "the recognition that the law of homicide serves other ends besides the prevention of homicide does not negate the point that its dominant purpose is the protection of life." Wechsler and Michael, *supra*, 37 Colum. L. Rev. at 729. It is clear that the rape and felony murder provisions have, as their "dominant purposes," the protection of different interests.[43]

---

underlying felony. Indeed, Wechsler and Michael acknowledge that "when the actor's proximate end is itself criminal or otherwise undesirable, the use of means that involve a homicidal risk obviously cannot be justified." 37 Colum. L. Rev. at 744-745 (footnotes omitted). While noting that the felony murder rule has been criticized when applied in cases where the homicidal risk is not one that is or ought to be known to the actor, the authors point out that the rule does not "make criminal any behavior that would not otherwise be criminal. Whether or not the actor knew or ought to have known that his act was dangerous to life is relevant, however, to the issue whether or not the treatment employed should be that which we are prepared to use in the effort to prevent behavior that is dangerous to life." *Id.* at 745 n.161. The "treatment" employed by Congress to deter excessive violence in the commission of dangerous felonies was the prospect of punishment for felony murder in addition to the punishment imposed for the underlying felony.

[43] As a plurality of this Court pertinently observed in *Coker* v. *Georgia*, 433 U.S. 584, 597-598 (1977) (footnotes omitted):

> [R]ape * * * is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and autonomy of the female victim and for the latter's privilege of choosing those with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self." It is also a violent

Petitioner nevertheless argues (Br. 31) that the felony murder provision is merely "a form of aggravated punishment for the felony itself, when aggravating consequences occur." This is wrong. Under the felony murder rule the defendant is not punished for the underlying felony itself, but for the homicide that accompanies the felony. This is evident from the fact that the punishment for first degree (felony) murder is exactly the same regardless of the nature of the predicate felony. Compare petitioner's brutal

---

crime because it normally involves force, or the threat of force or intimidation, to overcome the will and the capacity of the victim to resist. Rape is very often accompanied by physical injury to the female and can also inflict mental and psychological damage. Because it undermines the community's sense of security, there is public injury as well.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U.S., at 187, is an excessive penalty for the rapist who, as such, does not take human life.

See also 433 U.S. at 608 (opinion of Powell, J.); *id.* at 611-612 (Burger, C.J., dissenting).

rape and ensuing purposeful killing of his victim[44] with a defendant who steals a $200 watch from a store and then kills a store guard who attempts to prevent his escape: according to petitioner, each would be subject to exactly the same punishment, even though Congress has deemed rape a sufficiently serious offense to make it punishable by a maximum of 15 years to life imprisonment, while grand larceny is punishable by no more than 3 and 1/3 to 10 years' imprisonment (D.C. Code Ann. § 22-2201; § 24-203(a)). This equality of treatment under the murder statute, wholly without regard to the degree of social harm occasioned by the underlying felony (at least in the case of purposeful killings), refutes any suggestion that the penalty prescribed for felony murder is deemed also to redress the social harm occasioned by the felony.

4. *D.C. Code Ann. § 23-112 Authorizes Consecutive Sentences For Petitioner's Case*

The District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473, contains a provision specifically authorizing the District of Columbia courts to impose a sentence such as petitioner received in this case. Section 210 of that Act, 84 Stat. 604, 610, added present Section 23-112 to the District of Columbia Code. It provides as follows:

---

[44] While the jury did not have to find a purposeful killing in order to convict petitioner of felony murder, it necessarily made that finding in convicting him of second degree murder.

> A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not.

The statute thus expresses a legislative policy, applicable by its literal terms to the facts of this case, in favor of consecutive sentencing for two offenses, regardless of their relationship to one another, unless the sentencing court expressly elects concurrency.

A consideration of the origin and purposes of this statute confirms the conclusion from its language that petitioner's statutory construction contentions are untenable. Section 23-112 was enacted to clarify the authority of the sentencing court by overruling two related lines of judicial decisions of which Congress disapproved. First, the provision was intended to overturn *Borum* v. *United States*, 409 F. 2d 433 (D.C. Cir. 1967), cert. denied, 395 U.S. 916 (1969), which had held that sentences imposed at different times for unrelated offenses were presumed to run concurrently with one another in the absence of an express specification at the time of the imposition of the second sentence that it was to be consecutive to the earlier one. See H.R. Rep. No. 91-907, 91st Cong., 2d Sess. 113 (1970). To this end, the statute provides that sentences shall be consecutive unless the court provides that they be served concurrently.

The second issue that the statute addresses, and the one that more directly concerns us here, is sentencing for offenses arising out of the same transaction. To place this matter in perspective, it is necessary to consider what the governing law was in the District of Columbia prior to 1970, for the Committee specifically disapproved that law and changed it through Section 23-112. See H.R. Rep. 91-907, *supra*, at 114.

In *Ingram* v. *United States*, 353 F.2d 872 (D.C. Cir. 1965), the defendant was convicted of both assault with intent to kill and assault with a dangerous weapon, based on one assault with a knife. The two offenses were defined in different provisions of the D.C. Code, and each required proof of a fact that the other did not. See 353 F.2d at 856 (Burger, J., dissenting).[48] The trial judge sentenced the defendant to consecutive terms on each count, but the court of appeals reversed. Although the court recognized that the two offenses were distinct under *Blockburger*, it found it necessary to look beyond such "stereotyped formulae." 353 F.2d at 874. In doing so, the court found no clear indicia of intent to punish consecutively when both offenses arose out of the same assault, and it applied a rule of lenity to conclude that doubts on the matter should be resolved in favor of the defendant. It therefore held that consecutive sentences were illegal. Then-Circuit Judge Burger,

---

[48] Assault with intent to kill required proof of that intent; assault with a dangerous weapon required proof of use of a dangerous weapon.

dissenting, would have affirmed the consecutive sentences on the ground that, by requiring different elements of proof for each offense, Congress had sufficiently indicated its intent that the offenses could be consecutively punished, and that further inquiry into its intent was unnecessary.

In *Davenport* v. *United States*, 353 F.2d 882 (D.C. Cir. 1965), decided by a different panel shortly afterwards, the court followed the analysis set forth in *Ingram* and concluded that consecutive sentences were illegal for assault with a dangerous weapon and manslaughter, because Congress had not clearly intended such. Finally, in *Smith* v. *United States*, 418 F.2d 1120 (D.C. Cir. 1969), the court followed *Ingram* and again invalidated consecutive sentences for assault with intent to kill and assault with a dangerous weapon. The court stated that, while consecutive sentences could be imposed where the "actions and intent of defendant constitute distinct successive criminal episodes," that was not the case there, where the defendant committed only a single assault. *Id.* at 1121.

In devising Section 23-112, the House Committee specifically disapproved *Ingram*, *Davenport* and *Smith*. It declared the general rule (which the cited cases acknowledged) that "whether or not consecutive sentences may be imposed depends on the intent of Congress." H.R. Rep. No. 91-907, *supra*, at 114. "Since Congress in enacting legislation rarely specifies its intent on this matter," the Committee continued, "courts have long adhered to the rule that

Congress did intend to permit consecutive sentences when each offense 'requires proof of a fact which the other does not.'" *Ibid.*, citing *Blockburger* v. *United States*, *supra*, and *Gore* v. *United States*, *supra*. The District of Columbia courts, the Committee said, "have retreated from this settled principle of law" in finding congressional intent not clear "despite the offenses being defined in separate provisions [of the D.C. Code]." *Ibid.* The Committee concluded:

> To obviate the need for the courts to search for legislative intent, section 23-112 clearly states the rule for sentencing on offenses arising from the same transaction. For example, a person convicted of entering a house with intent to steal and stealing therefrom shall be sentenced consecutively on the crimes of burglary and larceny unless the judge provides to the contrary.

The very least that is clear from Section 23-112, considering the House Committee's report, is that Congress was rejecting the rule of *Ingram*, *Davenport* and *Smith* that some evidence of congressional intent beyond the fact that Congress had delineated separate elements was required before a judge could impose consecutive sentences for crimes arising out of the same transaction. Henceforth, Congress said in enacting Section 23-112, if a defendant is convicted of two crimes arising out of the same transaction, a consecutive sentence is not illegal if each crime requires proof of an element that the other does not. In fact, said Congress, not only *may* the judge punish consecutively in such circumstances, the

sentences *shall* be consecutive "unless the court imposing * * * sentence expressly provides otherwise * * *." D.C. Code Ann. § 23-112.

The crucial inquiry in the present case is whether Congress meant that *only* in such circumstances (*i.e.*, where each offense requires proof of a fact that the other does not) may the judge sentence consecutively. Plainly it did not. Section 23-112 states that, unless the judge provides otherwise, sentences on two offenses shall run consecutively "whether or not" one requires a proof of a fact that the other does not. Had Congress intended to prohibit the judge from imposing consecutive sentences where the *Blockburger* test is not satisfied, it would have said "*if* (or "only if") *each* offense" instead of "whether or not the offense." Plainly, "if" and "whether or not" are not synonymous; they are in fact antonymous.[46]

In short, Congress has specifically provided in Section 23-112 for consecutive sentencing in cases such as petitioner's. In so arguing, we do not mean to suggest the implausible conclusion that Congress was authorizing consecutive sentences for a greater and a necessarily included lesser offense (such as armed robbery and robbery). That question, after all, would not often arise, since offenses standing in such a

[46] The District of Columbia Court of Appeals has relied on Section 23-112 in upholding consecutive sentences for offenses arising out of the same transaction where each requires proof of a fact that the other does not. *E.g.*, *Hammond* v. *United States*, 345 A.2d 140 (1975) (assault with a dangerous weapon and carrying a dangerous weapon); *Fowler* v. *United States*, 374 A.2d 856, 859-860 (1977) (larceny and false pretenses).

relationship to one another are not ordinarily charged in separate counts and thus produce only a single conviction. Moreover, since Congress would be so unlikely to have intended such a result, it would be proper to refuse to give the statute its literal meaning if such a case ever arose. But the question is entirely different in cases involving a predicate offense rather than a necessarily included one, since the result provided by the statutory language is well within the range of rational legislative policy choices (here, indeed, as shown above, the result is supported by history and reason).[47]

It may well be that, in enacting this statute, Congress was primarily concerned with offenses that were not greater and lesser included in any sense, but its words clearly addressed the instant circumstances. This Court is not at liberty to narrow the statute to apply only to the specific aspects of the problem that Congress had uppermost in mind, and then to provide precisely the opposite outcome for related aspects of the problem that may have been of lesser concern to Congress. Congress wrote the statute in a way that covers both situations. If there were some indication in the legislative history that Congress did not intend consecutive sentences where proof of one offense is a predicate to conviction on another, per-

[47] Nor do we suggest that the general provisions of Section 23-112 would override specific evidence of legislative intent, in connection with particular pairs of offenses, not to allow cumulative punishment, as in *Simpson* and *Jeffers*. There is, however, no such evidence here.

haps an argument could be made in petitioner's favor. But that is not the case. Congress was unmistakably removing restrictions that the District of Columbia Circuit had imposed on the trial court's discretion to provide for consecutive sentences, and in doing so Congress refrained from imposing substantive restrictions on the trial court. In sum, not only does Section 23-112 not prohibit the sentences imposed on petitioner, it affirmatively allows such a sentence "whether or not" the elements are the same.

CONCLUSION

The judgment of the District of Columbia Court of Appeals should be affirmed. If, however, the judgment is reversed, the case should be remanded to the court of appeals for the purpose of reinstating petitioner's sentence for second degree murder.[48]

---

[48] The trial court sentenced petitioner to a term of from 15 years to life imprisonment for second degree murder. This sentence was to run concurrently with the sentence for first degree (felony) murder and, like that sentence, consecutively to the rape sentence. The sole reason for vacating this sentence on appeal was that second degree murder is a lesser included offense of first degree murder; since the court upheld the sentence on the latter charge, it followed that the sentence on the former should be vacated (A. 14). Petitioner acknowledges that there is no bar to consecutive sentences for rape and second degree murder (Br. 30 n. 15); should this Court now conclude that the sentences upheld by the court of appeals are invalid because the consecutive sentences for rape and felony murder may not coexist, the intentions of the sentencing court and the interests of justice call for reinstatement of the valid consecutive sentence for second degree murder (which would result in a total sentence of 30 years to life imprisonment, rather than the minimum of 35 years that petitioner now faces or the minimum of 20 years that would ensue from a simple reversal of the rape sentence). Thus, if this Court does accept petitioner's contentions, it should exercise its power under 28 U.S.C. 2106 and remand the case for correction of the sentence as described.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

ALLAN A. RYAN, JR.
Assistant to the Solicitor General

JEROME M. FEIT
ELLIOTT SCHULDER
Attorneys

SEPTEMBER 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 301362 84